Google

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

REPORTS OF CASES

RULED AND ADJUDGED

IN THE

COURTS OF PENNSYLVANIA,

BEFORE AND SINCE

THE REVOLUTION.

BY A. J. DALLAS.

Atque eo magis necessaria est hæc opera, quod et nostro æsculo non desunt, et olim non defuerunt, qui *hanc juris partem* ita contemnerent, quasi nihil ejus præter inane nomen existeret.—GROTIUS.

VOL. I.

FOURTH EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

THE BANKS LAW PUBLISHING COMPANY,
21 MURRAY STREET,
NEW YORK.
1905.

Entered according to act of Congress in the year 1852,
By BANKS & BROTHERS,
In the office of the Librarian of Congress at Washington

WE all knowing the learning, integrity and abilities of Alexander James Dallas, Esquire, *Counsellor at law, do, for the common good, approve and recommend the printing and publishing his book, entitled,* "Reports of Cases ruled and adjudged in the Courts of PENNSYLVANIA, before and since the Revolution."

THOMAS MCKEAN,
WILLIAM A. ATLEE.
JACOB RUSH.
GEORGE BRYAN.
EDWARD SHIPPEN.

PHILADELPHIA, 29th April 1790.

TO THE HONORABLE

THOMAS McKEAN, ESQUIRE, LL.D.

CHIEF JUSTICE OF THE STATE OF PENNSYLVANIA.

&c. &c.

SIR,

IN addressing this volume to you, the public will readily acknowledge the justice and propriety of the tribute; since a work of this nature is only to be esteemed, like a mirror, for the truth and accuracy with which its object is reflected; and I do nothing more on the occasion, than present you with your own portrait, in which all the praise I covet or deserve, is that of having preserved some resemblance to the original.

But independent of this consideration, the opportunity of making the present offering, yields a high gratification to my feelings and my pride. By the uniform courtesy and cordiality of your attentions, I have naturally been inspired with sentiments of esteem and attachment; and it would betray great insensibility, were I not aware of the advantage of delivering these reports to the world, under the sanction of your avowed approbation and patronage. Hence, Sir, I consider the enjoyment of your good opinion as an honorable source of self-gratulation, and the testimony of your judgment as a sure recommendation to the public.

Were I here inclined to pursue the beaten track of dedications, permit me, Sir, to observe, that an occasion, or a subject, more favorable, seldom can occur. It is my intention, however, that this address should be viewed, not as the eulogy of a patron, but as an instrument of thanks, and a token of regard: For, history, which may applaud without the suspicion of flattery, must hereafter do justice to your merits; but it is by this opportunity alone, that I could enjoy the satisfaction of publicly declaring the respect and esteem with which,

I am, Sir,

Your obliged and

Most obedient Servant,

A. J. DALLAS.

Philadelphia, 1*st May* 1790.

PREFACE

TO THE THIRD EDITION.

The reports contained in the following pages furnish some of the earliest specimens of our American jurisprudence; and (with the exception of a small volume published in Connecticut) were the first of the series of printed decisions in this country. Their intrinsic value and merits are sufficiently attested by the authority which has been uniformly attributed to them by the profession at home; while from abroad they have received the remarkable and distinguished praise of Lord Mansfield, in a letter to Chief Justice McKean, which is subjoined. From the number of important and leading cases contained in this volume, there are probably few books of reports so frequently and respectfully cited at this time.

In undertaking to prepare a new edition for the press, my intention was, simply, to rectify such inaccuracies as appeared in the text, and to supply the references to the later decisions in this state. It will be seen, that in some instances I have ventured beyond this humble labor, and endeavored to reconcile some conflicting decisions in this and other volumes of our reports, and to elucidate some that appeared obscure.

Having, through the kindness of Edward Shippen Burd, Esq., had access to the MSS. of the late Chief Justice Shippen, I have been enabled to correct or explain some few cases which have not been perfectly understood by the profession.

In the original preface to this volume, the author expressed his obligations to the kindness of Mr. Rawle for the use of his manuscript collection of cases. At the distance of forty years from that period, having derived information and assistance from the same collection, I am unwilling to close this notice without adding my own tribute of acknowledgments to the same eminent and estimable gentleman; who, after nearly half

century of forensic labor and distinction, now enjoys, in the reverence of his professional brethren, and the universal respect of his fellow-citizens, the abundant harvest of an honorable and well-spent life.

T. I. WHARTON.

PHILADELPHIA, *January* 1830.

To the Honorable THOMAS MCKEAN, *Chief Justice of Pennsylvania.*

KENWOOD, Feb. 14, 1791.

SIR,

I AM not able to write with my own hand, and therefore, must beg leave to use another, to acknowledge the honor you have done me, by your most obliging and elegant letter, and the sending me Dallas' Reports.

I am not able to read myself, but I have heard them read with much pleasure. They do credit to the court, the bar and the reporter: they show readiness in practice, liberality in principle, strong reason and legal learning: the method, too, is clear, and the language plain.

I undergo the weight of age, and other bodily infirmities;—but, blessed be God! my mind is cheerful, and still open to that sensibility, which praise from the praiseworthy never fails to give—*laus laudari à te.* Accept the thanks of,

Sir, your most obliged
and obedient humble servant,
MANSFIELD.

A TABLE

OF THE

NAMES OF THE CASES COMPRISED IN THIS VOLUME.

The References are to the STAR *pages.*

A

	*PAGE
Abbot *v.* Pinchin	349
Adams *v.* La Combe	440
Albertson's Lessee *v.* Robeson	9
Anonymous	1, 20
Ashton's Lessee *v.* Ashton	4

B

Barnard *v.* Field	348
Barnet's, Lazarus, Case	152
Belt *v.* Dalby	167
Bethel *v.* Lloyd	2
Biddle's Lessee *v.* Shippen	19
Bœhm *v.* Engle	15
Bolton *v.* Martin	296
Brown *v.* Edgar	311
Brown *v.* Scott	145
Brown *v.* Sutter	239
Buckley *v.* Durant	129
Bunner *v.* Neil	457
Burke's Lessee *v.* Ryan	94
Burrows *v.* Heysham	133
Busby *v.* Busby	226
Butcher *v.* Coats	340

C

Caldwell *v.* Barclay, *in note*	305
Calvert *v.* Pitt	406
Camp *v.* Lockwood	393
Campbell *v.* Richardson	131
Carlisle *v.* Cunningham	81
Carrew *v.* Willing	130
Case *v.* Hufty	154
Chaplin *v.* Kirwan	187
Chapman *v.* Steinmetz	261
Cooper *v.* Coats	248
Cooper *v.* Coats	308
Cummings *v.* Linn	444

D

Davey *v.* Turner	11
Davison's Lessee *v.* Bloomer	123
De Haven *v.* Henderson	424
Doane's Adm'r *v.* Penhallow	218
Dorrow *v.* Kelly	142
Dutilh *v.* Ritchie	171
D'Utricht *v.* Melchor	428

E

Eastwick *v.* Hugg	222
Elliot *v.* Elliot	379

F

Fallowfield *v.* Marlborough	28
Farrel *v.* McClea	392
Finlay *v.* Knox	[illegible]
Fothergill's Lessee *v.* Stover	[illegible]

G

	PAGE
Gerard *v.* Basse	119
Gerard *v.* La Coste	194
Geyer *v.* Smith	347
Geyger *v.* Stoy	135
Gibbs *v.* Gibbs	371
Gilpin *v.* Semple	251
Gorgerat *v.* McCarty	368
Graaff *v.* Smith's Adm'rs	481
Græme *v.* Harris	456
Graham's Appeal	136
Gregory's Lessee *v.* Setter	193
Grier *v.* Grier	173
Guthrie *v.* White	268

H

Hagner *v.* Musgrove	83
Halhead *v.* Ross	405
Hamilton's Lessee *v.* Galloway	93
Hamilton *v.* Callander's Ex'rs	420
Hart *v.* James	355
Heister's Lessee *v.* Lambert	20
Henderson *v.* Allen	149
Henry *v.* Risk	265
Hewes *v.* McDowel	5
Hight *v.* Wilson	94
Hocker *v.* Stricker	225
Hollingsworth *v.* Hamelin	151
Hollingsworth *v.* Leiper	161
Hollingsworth *v.* Ogle	287
Holmes *v.* Comegys	439
Hooton *v.* Will	157
Hooton *v.* Will	450
Hudson *v.* Howell	310
Hunter's Lessee *v.* Kennedy	81
Hurst *v.* Dippo	20
Hyam's Lessee *v.* Edwards	1

I

Ingles *v.* Bringhurst	341
Innes *v.* Miller	188

J

Jackson *v.* Keely	135
Jackson *v.* Mason	135
Jackson *v.* Vanhorn	241
Jacobs *v.* Adams	52
James's Claim	47
James *v.* Allen	188
James *v.* Brown	339
James *v.* Young	248
January *v.* Goodman	208
Johnson *v.* Hocker	406

K

Keely *v.* Ord	314
Kennedy *v.* Fury	72
Kennedy *v.* Nedrow	415
Kepple *v.* Williams	29
Kerlin's Lessee *v.* Bull	175
King (The) *v.* Haas	9
King (The) *v.* Lukens	5
King (The) *v.* Rapp	9
King's Road	12
Kirkbride *v.* Durden	288
Kuhn *v.* Primer	224
Kunckle *v.* Baker	169
Kunckle *v.* Kunckle	364
Kunckle *v.* Wynick	395

L

Lee *v.* Biddis	175
Leib *v.* Bolton	82
Lesher *v.* Gehr	330
Levinz *v.* Will	430
Lewis *v.* Maris	278
Lloyd *v.* Taylor	17
Lyle *v.* Foreman	480
Lynch *v.* Wood	310

M

Mariot *v.* Davey	164
McCarty *v.* Nixon	78
McClenachan *v.* McCarty	375
McCullough *v.* Houston	444
McCullum *v.* Coxe	139
McDill's Lessee *v.* McDill	63
McKegg *v.* Crawford	347
McVeaugh *v.* Goods	62
Mifflin *v.* Bingham	272
Mifflin *v.* Gasqui	142
Millor *v.* Hall	229
Montgomery *v.* Henry	50
Moore's Lessee *v.* Few	170
Morgan *v.* Bower	295
Morgan *v.* Eckart	295
Morris's Lessee *v.* Vanderen	64
Morris *v.* De Mars	140

	PAGE
Morris *v.* Foreman	193
Morris *v.* Tarin	147
Murdock *v.* Will	341
Musgrove *v.* Gibbs	216

N

Nathan *v.* Virginia, *in note*	77
Newman *v.* Bradley	240
Nixon *v.* Long	6

O

Ogden *v.* Ash	162
O'Neil *v.* Chew	379
Oxley *v.* Cowperthwaite	349
Oxley *v.* Oldden	430

P

Parker *v.* Wood	436
Patton *v.* Caldwell	419
Penman *v.* Wayne	241
Penman *v.* Wayne	348
Penrose *v.* Hart	378
Phelps *v.* Holker	261
Phile *v.* Ship Anna	197
Phillips *v.* Hyde	439
Pinchin *v.* Fry	405
Pirate *v.* Dalby	167
Pleasants *v.* Meng	380
Plowman *v.* Abrams	316
Pollard *v.* Shaffer	210
Poultney *v.* Ross	238
Price *v.* Watkins	8
Primer *v.* Kuhn	452
Pringle *v.* McClenachan	486
Proprietary's Lessee *v.* Ralston	18
Purviance *v.* Angus	180

Q

Quesnel *v.* Mussi	436
Quesnel *v.* Mussi	449

R

Rapelje *v.* Emory	349
Rapp *v.* Le Blanc	63
Respublica *v.* Buffington	61
Respublica *v.* Caldwell	150
Respublica *v.* Campbell	354
Respublica *v.* Carlisle	35
Respublica *v.* Chapman	53
Respublica *v.* Doan	86
Respublica *v.* De Longchamps	111
Respublica *v.* Gordon	233
Respublica *v.* Keating	110
Respublica *v.* Malin	33
Respublica *v.* Mesca	73
Respublica *v.* Molder	33
Respublica *v.* Negro Betsey	469
Respublica *v.* Oswald	319
Respublica *v.* Powell	47
Respublica *v.* Roberts	39
Respublica *v.* Shaffer	236
Respublica *v.* Shriber	68
Respublica *v.* Sparhawk	357
Respublica *v.* Sweers	41
Respublica *v.* Teischer	335
Respublica *v.* Wade, *in note*	337
Rex *v.* Haas	9
Rex *v.* Lukens	5
Rex *v.* Rapp	9
Richardson's Lessee *v.* Campbell	10
Riche *v.* Broadfield	16
Richette *v.* Stewart	317
Rivers *v.* Walker	81
Robbins *v.* Whitman	410
Robertson *v.* Vogle	252
Rodman *v.* Hoops	85
Ross *v.* Clarke	354

S

Schlosser *v.* Lesher	251
Schlosser *v.* Lesher	411
Scottin *v.* Stanley	129
Shewell *v.* Wycoff	312
Shippen's Lessee *v.* Bush	251
Shoemaker *v.* Knorr	197
Shoemaker *v.* Shirtliffe	127
Shoemaker *v.* Shirtliffe	133
Shotwell *v.* Bœhm	172
Shrider's Lessee *v.* Nargan	68
Sliver *v.* Shelback	165
Smith *v.* Davids	410
Snowden *v.* Hemmings	83
Somers *v.* Balabrega	164
Starrett's Case	356

	PAGE
Steele *v.* Steele	409
Steiner *v.* Fell	21
Steinmetz *v.* Curry	234
Steinmetz *v.* Curry	270
Stevenson *v.* Pemberton	3
Story *v.* Strettel	10
Stotesbury *v.* Covenhoven	164
Strickland's Lessee *v.* Poole	14
Swift *v.* Hawkins	17

T

Talbot *v.* Commanders and Owners of three Brigs	95
Taylor *v.* Knox	158
Tetter *v.* Rapesnyder	293
Thomas *v.* Horlocker	14
Thompson *v.* Musser	458
Thompson *v.* Young	294
Thompson's Lessee *v.* White	424
Tillier *v.* Whitehead	269
Tracey *v.* Wyckoff	124

V

Vanhorne's Lessee *v.* Harrison	137
Vienne *v.* McCarty	154

W

Wallace *v.* Childs	7
Wallace *v.* Fitzsimons	248
Walton *v.* Willis	265
Walton *v.* Willis	351
Waters *v.* Millar	369
Weaver *v.* Lawrence	156
Weaver *v.* Lawrence	379
Wells *v.* Fox	308
Weston *v.* Stammers	2
Wharton *v.* Morris	125
Wheeler *v.* Hughes	23
Whiteside *v.* Oakman	293
Wilcox *v.* Henry	69
Williams *v.* Craig	313
Williams *v.* Geheogan	267
Wilson's Lessee *v.* Campbell	126
Woods *v.* Courter	141

Y

Young *v.* Reubens	119

Z

Zane's Ex'rs *v.* Cowperthwaite	312
Zautzinger *v.* Pole	419

NOTE.—The volume cited as 1 *State Laws* is that generally known as Hall & Seller's edition of the Province Laws; 2 *State Laws* is known as McKean's Laws, printed by Francis Bailey; 3 *State Laws* s the volume of Pamphlet Laws from 1781 to 1785, &c. In the present edition, statutes have been cited from Smith's Laws, when practicable.

A TABLE

OF THE

CASES CITED IN THE OPINIONS OF THE COURT.

The references are to the STAR *pages.*

A

		*PAGE
Alder *v.* Chip	2 Burr. 756	462, 465
Allen *v.* Dockwra	1 Salk. 127	235
Anon	1 Mod. 169	161
Anon	12 Mod. 439	234
Anon	2 Eq. Abr. 684	435
Archer *v.* Bokenham	11 Mod. 161	434, 470
Axtel *v.* Axtel	2 Chan. Ca. 24	417

B

Baker's Case	5 Co. 104, Cro. Eliz. 752	21
Baynes *v.* Brighton	Cro. Car. 515	468
Beale *v.* Beale	Cro. Car. 383	174
Bellasis *v.* Compton	2 Vern. 294	427
Bernardi *v.* Motteux	2 Doug. 554	318
Berwick's Case	Fost. Cr. L. 10	38
Bevis *v.* Lindsel	2 Str. 1149	209
Bickerdike *v.* Bollman	1 T. R. 408	235
Bird *v.* Bird	1 Salk. 74	175
Bishop of London *v.* Mercers' Co.	2 Str. 931	462
Blackford *v.* Kennedy	MS	418
Blesard *v.* Hirst	5 Burr. 2671	235
Blythe *v.* Hill	1 Mod. 225	347, 244
Brickhead *v.* Archbishop of York	2 Hob. 199	461
Bridgwater, Countess of, *v.* Duke of Bolton	6 Mod. 109–10	138
Bright *v.* Eynon	1 Burr. 395	234
British Sergeant's Case	MS	408
Brown *v.* Brown	1 Vern. 157	315
Brown *v.* Franklin	Carth. 474	108
Burland *v.* Tyler	8 Mod. 356	461
Buxendin *v.* Sharp	2 Salk. 662	461

C

		PAGE
Cass *v.* Rudele	2 Vern. 280	212
Chamberlaine *v.* Chamberlaine	2 Freem. 34	427
Chapman *v.* Dalton	1 Plowd. 290	212
Chapman *v.* Lamb	2 Str. 943	206
Charles *v.* Andrews	9 Mod. 152	418
Churchill *v.* Hopson	1 P. Wms. 244	312
Clark *v.* Mundall	1 Salk. 124	424
Clay *v.* Sudgrace	1 Salk. 33	99
Clerk *v.* Withers	6 Mod. 295	313
Combs *v.* Hundred of Bradley	2 Salk. 613	104
Corbit's Case	4 Co. 81 b	215
Corneforth *v.* Geer	2 Vern. 705	315
Cotton *v.* Horsemanden	Prac. Reg. Com. Pl. 357	267
Coxe *v.* Bolton	MS.	309
Crossing *v.* Scudamore	2 Lev. 10	138
Croyston *v.* Baynes	Prec. in Ch. 208	427
Cumber *v.* Wane	1 Str. 427	424

D

Darlington *v.* Pulteney	Cowp. 160	426
Davis *v.* Mazzinghi	1 T. R. 795	389
Davy, Ex parte	Cas. temp. Hardw. 289	388
Dawson's Case	MS	90
Dehers *v.* Harriot	1 Show. 163	263
Dennis' Case	Dyer 248	418
Devenish *v.* Baines	Prec. in Ch. 3	427
Dingwall *v.* Dunster	1 Doug. 235	254
Doe *v.* Simpson's Assignees	2 Wils. 22	137
Dolman *v.* Pritman	3 Rep. Ch. 64	267

E

Edie *v.* East India Co	1 W. Bl. 195	196
Edwards *v.* Bailey	Cowp. 600	212

F

Farmer *v.* Arundel	2 W. Bl. 825	149
Finch *v.* Wilson	1 Wils. 168	412
Fletcher *v.* Ingram	12 Mod. 86	463
Ford *v.* Lord Gray	6 Mod. 45	64, 69
Forster *v.* Brunetti	Salk. 83	366
Foster *v.* Jackson	Hob. 54	462
Freeland *v.* Hunt	2 Wils. 380	462
Frogmorton *v.* Holiday	3 Burr. 1618, 1 W. Black. 535	227
Frogmorton *v.* Wright	2 W. Black. 889, 3 Wils. 414	227
Fry *v.* Porter	Cas. in Ch. 141	211

CASES CITED.

G

		PAGE
Gidley *v.* Williams	1 Salk. 37	461
Godfrey *v.* Norris	1 Str. 34	123
Goodall *v.* Dolley	1 T. R. 712	235
Goss *v.* Nelson	1 Burr. 227	176
Goss *v.* Withers	2 Burr. 683	102
Greeby *v.* Palmer	Bunb. 232 n.	206
Greenhill *v.* Waldoe	Finch Ch. 368	417
Gregg's Case	Fost. C. L. 217	40
Grescot *v.* Green	1 Salk. 199	211
Grobham *v.* Thornborough	Hob. 82	461

H

Harper *v.* Burgh	2 Lev. 206	211
Harris *v.* Benson	2 Str. 910	267
Harrison *v.* North	Cas. in Ch. 83	212
Harry *v.* Perrit	1 Salk. 133	461
Harvey *v.* Harvey	2 Ch. Cas. 180	426
Havers *v.* Bannister	1 Wils. 7	465
Hawes *v.* Bireb	1 Brownl. 71	424
Hawkins *v.* Colclough	1 Burr. 277	174
Hawks *v.* Crofton	2 Burr. 700	462
Hayes *v.* Bickerstaff	Vaugh. 122	213
Hayman *v.* Rogers	1 Str. 232	461
Hayward *v.* Whitby	1 Burr. 228	177
Heard *v.* Baskerville	Hob. 232	461
Helin *v.* Jenings	1 Freem. 509	48
Henry *v.* Risk	1 Dall. 265	316
Herbert's Case	3 Co. 13	484
Herlekendon's Case	4 Co. 63 *b*	211
Hill *v.* Lewis	1 Salk. 132	195
Hodges *v.* Steward	1 Salk. 125	195
Holliday *v.* Pitt	2 Str. 985	304
Holloway's Case	3 Mod. 42	92
Holt *v.* Holt	Cas. in Ch. 190	212, 214
Hook *v.* Taylor	2 Vern. 561	177
Hooper *v.* Shepherd	2 Str. 1089	462
Hosier *v.* Read	9 Mod. 88	427

I

Ivy *v.* Gilbert	Prec. in Ch. 353	138

J

Jacobs *v.* Adams	1 Dall. 52	266
Jesson *v.* Essington	Prec. in Ch. 207	463
Johnson *v.* Gardiner	10 Mod. 254	347
Johnson *v.* Kennion	2 Wils. 262	254

		*PAGE
Jones *v.* Bodinham	5 Mod. 227	462
Jones *v.* Earl of Bath	4 Mod. 367	29
Jordan *v.* Barloe	3 Salk. 67	195

K

Kennedy *v.* Wistar	MS.	418
King *v.* Broom	12 Mod. 134	108
King *v.* Chapman	cited 2 Yeates 4	110
King *v.* Gordon	1 Doug. 572	463
King *v.* Jackson	1 Lev. 124	183
King *v.* Knolles	1 Salk. 47	465
King *v.* Webb	2 Ld. Raym. 1461	44

L

Lawrence *v.* Brasier	Cas. in Ch. 72	212, 214
Lawrence *v.* Lawrence	2 Vern. 365	418
Le Caux *v.* Eden	2 Doug. 572	105, 220
Le Clerc *v.* Richette	MS.	368
Leehill *v.* Reynell	2 Str. 950	465
Leigh *v.* Brace	5 Mod. 266	138
Levins *v.* Randall	12 Mod. 414	461
Levinz *v.* Will	1 Dall. 430	478
Lindo *v.* Rodney	2 Doug. 613	105
Lloyd *v.* Spillet	Barnard. in Ch. 388	427
Lock *v.* Major	1 Str. 533	382
Lord Morly's Case	Kelyng 54	89
Lovelace *v.* Cocket	1 Brownl. 47, Hob. 68–9	424
Lowry *v.* Bourdieu	Doug. 452	149

M

McDowell's Case	MS.	7
Mace *v.* Lovett	5 Burr. 2834	465
Magdalen College Case	11 Co. 73	434
Maleverer *v.* Spink	Dyer 36	363
Man *v.* Cary	3 Salk. 154	463
Manfield *v.* Dugard	Gilb. Rep. in Eq. 36	177
Marlborough's Executors *v.* Widmore	2 Str. 890	465
Martin *v.* O'Hara	Cowp. 823	383
Masters *v.* Harriet	12 Mod. 44	461
Maxwell *v.* Mountacute	Prec. in Ch. 526	427
Mease *v.* Mease	Cowp. 47	426
Monk *v.* Cooper	2 Str. 763	212
Moore *v.* Magrath	Cowp. 9	212
More *v.* Manning	Com. 311	196
Morris *v.* Barry	1 Wils. 1	462
Moses *v.* Macferlan	2 Burr. 1005	260
Mostyn *v.* Fabrigas	Cowp. 174	463

		PAGE
Murdoch *v.* Will	1 Dall. 341	350
Musgrave *v.* Nevinson	1 Str. 584	234

N

Newcastle, Duke of, *v.* Wright	1 Lev. 190	461
Newton *v.* Preston	Prec. in Ch. 103	427
Newton *v.* Rowse	1 Vern. 460	214
Nichols *v.* Grunnion	Hob. 49	174
Nickson *v.* Brohan	10 Mod. 109	184
Nixon *v.* Long	1 Dall. 6	141

O

Omichund *v.* Barker	2 Eq. Abr. 406, 409; 1 Atk. 21	463–4
Ottenreed's Case	MS.	74

P

Paler *v.* Hardyman	Yelv. 71	462
Paradine *v.* Jane	Aleyn 27	212, 214
Peck *v.* Hill	2 Mod. 136	424
Peterborough *v.* Sadler	12 Mod. 347	234
Pitt *v.* Yalden	4 Burr. 2060	184
Pleasant *v.* Pleasant	1 Chan. Ca. 181	417
Pocklington *v.* Hatton	3 Mod. 220	234
Poulter *v.* Cornwall	1 Salk. 9	461
Preston *v.* Christmas	2 Wils. 87	424
Pride *v.* Earl of Bath	1 Salk. 121	462

R

Radcliff's Case	Fost. Cr. L. 44	87
Radley *v.* Egglesfield	2 Lev. 25; 2 Saund. 259	220–1
Redwood *v.* Coward	1 Salk. 328	462
Regina *v.* Inhabitants of Glamorganshire	12 Mod. 403	463
Regina *v.* Tutchin	6 Mod. 270	462
Rex *v.* Edwards	Comb. 419	465
Rex *v.* Landaff	2 Str. 1006	461
Rex *v.* Morris	Bull. N. P. 275	196
Rex *v.* Philips	1 Burr. 293	234
Rex *v.* Wilkes	4 Burr. 2541, 2551, 2569	90–1, 465
Roades *v.* Barnes	1 Burr. 9	424
Rushton *v.* Aspinall	2 Doug. 658	461
Russel *v.* Langstaffe	2 Doug. 497	235
Russel *v.* Palmer	2 Wils. 325	185

S

Salmon *v.* Denham	Com. 329	174
Savage *v.* Waltby	11 Mod. 135	184

		PAGE
Sayer *v.* Pocock	Cowp. 407	461, 462, 463
Scott *v.* Galbraith	cited 4 Binn. 334	134
Scudamore *v.* Crossing	1 Mod. 175	138
Shelley's Case	1 Co. 98, 100	138–9, 212
Shubrick *v.* Salmend	3 Burr. 1637	212
Smell *v.* Dee	2 Salk. 415	176
Smith *v.* Browne	2 Salk. 666	169
Southcote's Case	4 Co. 84 *b*	212
Spencer's Case	5 Co. 16 *b*	211
Stafford's Case	Fost. Cr. L. 44	88
Stanley *v.* Ayles	3 Keb. 444	184
Stevenson *v.* Snow	3 Burr. 1240	212
St. Leger *v.* Pope	12 Mod. 81	461
Stuart *v.* Ralston	MS.	365
Sunday's Case	9 Co. 127	48
Sweetland *v.* Beezley	Barnes 4	134

T

Taverner's Case	1 Dyer 56, pl. 15	212
Taylor *v.* Biddal	2 Mod. 289	177
Taylor *v.* Wheeler	2 Vern. 564	436
Terremoulin *v.* Sandys	12 Mod. 143	101
Thomlinson *v.* Dighton	10 Mod. 35–6	137
Thorp *v.* Thorp	12 Mod. 459	461
Thrustout *v.* Peak	2 Eq. Cas. Abr. 312, ca. 18	48
Thynn *v.* Thynn	1 Vern. 296	426
Tindal *v.* Brown	1 T. R. 167, 168	235, 272

V

Vanderwoodst *v.* Thompson	2 Doug. 609	104
Vicars *v.* Hayden	Cowp. 841	465

W

Walker *v.* Witter	1 Doug. 1	383
Walrond *v.* Van Moses	8 Mod. 323	160
Watts *v.* Willing	2 Dall. 100	261
Welch *v.* Procter	MS.	350
Wentworth *v.* Deverginy	Prec. in Ch. 69	427
Wheeler *v.* Hughes	1 Dall. 23	444
White *v.* Collins	Com. 289	48
Wigglesworth *v.* Dallison	Doug. 190	212
Wilkinson *v.* Tranmer	2 Wils. 75	138

REPORTS OF CASES

BEFORE

THE REVOLUTION.

SUPREME COURT OF PENNSYLVANIA,

SEPTEMBER TERM, 1754.

Before WILLIAM ALLEN, Chief Justice, and LAWRENCE GROWDEN and CALEB COWPLAND, Justices.

ANONYMOUS.

Statute of Frauds.

The British statute of frauds does not extend to Pennsylvania.

ADJUDGED by the court, that the statute of frauds and perjuries does not extend to this province, though made before Mr. Penn's charter: the Governor of New York having exercised a jurisdiction here, before the making that statute, by virtue of the word *territories*, in the grant to the Duke of York, of New York and New Jersey.(*a*)

(*a*) The rule laid down by C. J. MCKEAN, in Morris's Lessee *v.* Vanderen, *post*, p. 67, "that statutes made in Great Britain before the *settlement* of Pennsylvania, have no force here, unless they are convenient, and adapted to the circumstances of the country; and that statutes made since the settlement of Pennsylvania have no force here, unless the colonies are particularly named," was, in substance, adopted by the Judges of the Supreme Court, in 1807, in their report to the legislature; with the additional observation, that certain British statutes passed since the settlement of the province, in which the colonies are not particularly named, have been incorporated with our law, either by recognition of the legislature, or by force of long-continued practice in the courts of justice. Of these, the statutes 3 & 4 *Anne*, c. 9, and 7 *Geo. II.*, c. 20, are instances; and nine others are inserted in the report of the judges. The question *when* the settlement of Pennsylvania took place, with reference to the binding operation of British statutes, does not seem to have been discussed in any other case, except that in the text. The statute of frauds (29 *Car. II.*, c. 3) was passed in 1676; *four* years previous to the date of the charter to *William Penn*, and *six* years previous to his actual

APRIL TERM, 1759.

WILLIAM ALLEN, Chief Justice, WILLIAM COLEMAN, Justice

The Lessee of HYAM and others *v.* EDWARDS.

Evidence.

A copy of a deed enrolled in England is evidence of title to lands here.
A copy of a register of births and deaths, kept by a religious society, duly authenticated, is evidence of death.

COPY of a deed enrolled in the King's Bench, in England, proved before the Lord Mayor of London to be a true one, allowed to be given in evidence to a jury, to support a title to lands in this province.(*a*)

*2] * SAME CAUSE.

COPY of the register of births and deaths of people called Quakers, in England, proved to be a true one before the Lord Mayor of London, allowed to be given in evidence, to prove the death of a person.(*b*)

---

settlement of the province; but *two* years after the date of the patent to the Duke of York, by whose order, it is said, a code of laws was prepared for New York and its dependencies.[1] Jurisdiction was certainly exercised over the western bank of the Delaware, under the authority of the Duke of York, prior to the landing of William Penn; but the remarks of the judges, in cases subsequent to that in the text, when discussing the question of the operation of British statutes, seems to look to the settlement of the province as commencing with the arrival of the latter. The charter of Charles II. to William Penn declared, § 6, "that the laws for regulating and governing property within the said province, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, and likewise as to felonies, shall be and continue the same as they shall be, for the time being, by the general course of the law in our kingdom of England, until the said laws shall be altered by the said William Penn, his heirs or assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them;" a provision which seems to imply that the emigrants of that period carried with them all the laws—both statute and common law—then existing in England. The true reason, probably, why the statute of frauds was not extended, in practice, to Pennsylvania, was, that its provisions were inapplicable to the simplicity of the earlier periods of Pennsylvania, and required greater expertness than the practitioners of those days generally possessed. An act of assembly passed on the 21st of March 1772 (2 Sm. L. 389), introduced part of the statute into our code. The first section of the act is in substance the same as the first three sections of the statute of Charles II.; and the 2d, 3d, 4th and 5th sections of the act correspond with the 14th, 15th, 16th and 25th sections of the statute. The important provisions contained in the 4th and 7th sections of the statute were omitted by the framers of the act of assembly.[2]

(*a*) 11 Mod. 2, pl. 2.

(*b*) In Kingston v. Lesley (10 S. & R. 389), C. J. TILGHMAN said, "considering all

[1] The statute of frauds and perjuries was passed in 1676, to take effect from and after the 24th June 1677; but the Duke of York's code of Laws was extended to the territories on the Delaware, embracing the present states of Pennsylvania and Delaware, on the 25th September 1676, by an ordinance of Governor Andross. Old Province Laws, 455. The Duke's Laws have been attributed to the pen of the Earl of Clarendon. Ibid. 414.

[2] But see acts of 26 April 1855 (P. L. 308), and 22 April 1856 (P. L. 633), which have been passed since Mr. Wharton's note was written.

Bethel *v.* Lloyd and others.

Partition.

Under the plea of *non tenent insimul*, the defendants may show that some of them are not tenants of the freehold.

Partition. Plea *non tenent insimul*, &c. Defendants permitted to give in evidence to the jury, that some of them were not tenants of the freehold,(*a*) but only tenants at will.(*b*)

The Lessee of Lewis and Mary Weston *v.* Thomas Stammers.

Evidence.

The exemplification of a will, made in England, and there proved, is evidence.
So are the minutes of the commissioners of property.
Depositions taken in a former cause between the parties, not admitted in evidence.

An exemplification of a will, made in England, and certified *generally* to have been proved, approved and registered, in the year 1704, in the prerogative court of Canterbury, under the seal of the said prerogative court, allowed, on debate, to be read in evidence to the jury.(*c*)

Same Cause.

Minutes of the Commissioners of Property allowed to be given in evidence.(*d*)

Same Cause.

Depositions taken in a former cause, by rule of court, with consent of parties (in an inferior court), in which the present defendant was a party, and where the present title (it was said) came in question, upon debate, were ruled by the Court to be no evidence in this cause.[1]

Note.—It did not appear that those depositions were read in evidence on the former trial. (*e*)

---

the authorities, we must take it, that the case of Hyam *v.* Edwards is law;" and upon the authority of this case, Kingston *v.* Lesley was determined. See also Fogler *v.* Simpson, cited 1 Yeates 17, 152, s. c. 2 Dall. 117; Douglass *v.* Sanderson, 2 Dall. 116, s. c. 1 Yeates 15; Winder *v.* Little, 1 Yeates 152; Lilly *v.* Kintzmiller, 1 Yeates 28; Keller *v.* Nutz, 5 S. & R. 251.

(*a*) Cro. Eliz. 759.

(*b*) See Bates *v.* McCrory, 3 Yeates 192; M'Kee *v.* Straub, 2 Binn. 1.

(*c*) In Morris *v.* Vanderen, *post*, p. 64, a will was allowed to go to the jury, under the same circumstances; but in Hylton *v.* Brown, 1 W. C. C. 298, it was determined, that to authorize a copy of a will, made in another state or country, to be admitted in evidence here, it was necessary that it should appear to have been proved there by two witnesses, according to the act of 1705. And see Logan *v.* Watt, 5 S. & R. 212.

(*d*) It has been held, however, that the minutes of the Board of Property are not evidence of any fact, but what passes immediately before it, and consequently, that they are not competent evidence of the facts stated in them to have been proved before the board. Deal *v.* McCormick, 3 S. & R. 343; Carothers *v.* Dunnings, Id. 379. And see Dougherty *v.* Piper, 3 Yeates 290; Foster *v.* Shaw, 7 S. & R. 156.

(*e*) See Boudereau *v.* Montgomery, 4 W. C. C. 186; Miles *v.* O'Hara, 4 Binn. 111; Richardson *v.* Stewart, 2 S. & R. 84.

[1] Since remedied by act 28th March 1814. 6 Sm. L. 208.

*APRIL TERM, 1760.

WILLIAM ALLEN, Chief Justice, LAWRENCE GROWDEN and WILLIAM COLEMAN, Justices.

STEVENSON *v.* PEMBERTON.

Factor's lien.

A. in the West Indies, being indebted to B. in Philadelphia, consigned goods to him, directing him to sell them on his (A.'s) account, and to apply the proceeds, after first satisfying himself, to the payment of other creditors; C., a creditor of A., attached the goods in the hands of B., before sale: *Held*, that B. was entitled to retain the goods for the payment of his own debt.

SCIRE FACIAS against defendant as garnishee. The case was: C. in the West Indies was indebted to P., the defendant, for bills of exchange drawn by C., in favor of P., which were protested; P., by letter, solicits C. for security; C. consigns a quantity of rum to P., and by letter directs P. to sell the same for his (C.'s) account, and apply the proceeds to the payment of some protested bills, drawn by C. in favor of other people, "first being satisfied that his (P.'s) bills were paid." The bills of lading express this rum to be shipped on the proper account and risk of C. The rum comes into P.'s hands, but before any sale, the plaintiff, S., a creditor of C., brought a foreign attachment against C., and attached these goods in the hands of P. The question on these facts, as found by a special verdict, was—whether P. should retain the goods for the payment of his own debt, or whether the property remained in C., so as to be liable to the attachment of S.?

It was urged by the counsel for the plaintiff, that the consignment of this rum to P., on the account of C., with orders to sell the same on the account of C., and then to apply the proceeds according to his directions, did not alter the property, but left the same in C., until a sale. And that P. was only to have a future interest in the money arising from the sale of the goods. But the plaintiff being as well a creditor as the defendant, and coming in under the law of attachments, before a sale, and while the property, by the very terms of the consignment, remained in C., ought to be first paid his debt. The counsel cited Bro., Property 2; 2 Mod. 242; 2 Ch. Cas. 7, 36; 1 Salk. 160; 12 Mod. 156.

For the defendant, it was contended, that the rum was a security in the hands of P., for the payment of P.'s debt, and that P. was a trustee for himself and the other Dutch bill-creditors. And that such a special property was vested in P., that C. himself could have no remedy to get these goods out of the hands of P., until P.'s debt was satisfied; and that the plaintiff could be in no better case than C. himself. The cases cited for the defendant were 2 Vern. 428; 2 T. Jones 222; 2 P. Wms. 326; Bro., Act. sur Case, 113, 271; Finch 299, 236; 10 Mod. 432; Yelv. 164; 2 Leon. 30; 10 Mod. 144; 2 Co. 26; 1 Str. 165.(*a*)

*4] *BY THE COURT.—This rum appears to have been sent to satisfy P.'s debt. If it had been money, there could have been no doubt but the defendant would have retained it. And the only difference is, that a commodity was sent, which must be converted into money, before the sum

(*a*) See Harman *v.* Fishar, Cowp. 125, *et anta.*

to be paid to P. could be ascertained; but, as to P.'s interest in it, the case was the same. Therefore, judgment, by the whole Court, was given for the defendant. (*a*)

Chew and *Moland, pro* Quer. *Galloway* and *Dickenson, pro* Def.

The Lessee of Asheton *v.* Asheton.

Present, Lawrence Growden and William Coleman, Justices.

Devise to the first heir male of I. S., when he shall arrive to the age of twenty-one years, he paying to A. & B., daughters of I. S., 40*l.* each; after the testator's death, I. S. had a son: *Held*, that he was entitled to recover, it being the intent of the testator, that the first son of I. S. should take.

On special verdict. Devise to the first heir male of I. S., when he shall arrive at the age of twenty-one years, he paying to A. and B., the daughters of I. S., 40*l.* each: after devisor's death, I. S. had a son, who attained the age of twenty-one years, and paid his sisters the 40*l.* each.

The question was, whether the son of I. S. could take by executory devise? It was objected for the *defendant*—1st. That this being a present devise, it could not take effect, because to a person not *in esse*. 2d. That though it might be construed a future devise, yet it was too remote; for an executory devise must take effect within the compass of a life or lives *in esse*, or, at farthest, within nine months after: And in this case, I. S. might have had no son, but a daughter, who might have had a daughter, who might have had a son, who would have been the first heir male of I. S., which would have been too remote a contingency, and would have tended to a perpetuity. And the case must be considered as at the time of making the devise, that is, how it might be; and not how it has actually happened. 3d. That the son of I. S. could not take; because the limitation was to the first heir male, and *nemo est hæres viventis*.

For the *plaintiff*, it was answered: 1st. That this was no present devise, the testator taking notice that I. S. had no son born, by the word first heir male, and using the words *when* and *paying*. 2d. That this contingency was not too remote; because the testator by the words *first heir male*, must have meant first son; and that such a construction must be made as to carry the intent of the testator into execution. 3d. *First heir male* are words of purchase and *designatio personæ*, and the law will supply the words, of the body, in a will.

By the Court.—The intent of the testator is clear, that the first son of I. S. should take: therefore, judgment, By the Court.

Cases cited; 1 Lord Raym. 207; 1 Salk. 229; Talbot's Cases 44, 50, 145; 1 Vern. 729; Vin., Dev. 315; 2 Vent. 311; 1 P. Wms. 229; 3 Co. 20; 2 P. Wms. 196; 2 Salk. 621.

Chew, pro Quer. *Moland* and *Dickenson, pro* Def. (*b*)

(*a*) See United States *v.* Vaughan, 3 Binn. 394; Corser *v.* Craig, 1 W. C. C. 424; Sharpless *v.* Welsh, 4 Dall. 279; Moore *v.* Spackman, 12 S. & R. 291.

(*b*) See Scattergood *v.* Edges, 12 Mod. 279, 287; Co. Litt. 24.

*APRIL TERM, 1762.

Present, WILLIAM ALLEN, Chief Justice, and WILLIAM COLEMAN, Justice.

The Lessee of JOSEPH and JAMES HEWES *v.* ANDREW MCDOWELL.

Evidence.

The original private memorandum book of the secretary of the land-office admitted by consent. A copy of a warrant of survey is competent evidence.

ON a question, whether the original private book of memorandums of the secretary of the land-office, respecting the description of the land originally applied for, should be given in evidence, it was urged that this book, containing the original entries from which the minutes of property are formed is the best evidence, and therefore ought to be admitted.

THE COURT said, it was a matter of consequence; and recommended it to the counsel of the other side to consent to the book's being given in evidence; which was accordingly done, and no determination given by the Court.(*a*)

SAME CAUSE.

THE Court said, that the copy of a warrant of survey, under the surveyor-general's hand, and containing his direction to the deputy-surveyor to make the survey, has always been given in evidence: And such a copy was now ruled to be admitted, and was read to the jury.(*b*)

THE KING *v.* JOHN LUKENS.

Criminal practice.

The act of 1705, requiring the prosecutor's name to be indorsed on an indictment, applies only where there is an *actual* prosecutor; and proof of the person prosecuting cannot be made by the defendant.

INDICTMENT for a nuisance. Mr. *Dickenson*, for the defendant, moved that a prosecutor should be indorsed on the indictment, agreeable to the act of assembly, (*c*) before the defendant should be put to plead.

Mr. *Chew*, attorney-general, urged that such a construction ought to be put on the act, as that public justice may not be eluded; and that there should be no necessity to indorse a prosecutor, unless it be proved that there is some person active in carrying on a prosecution; because, if it took its rise from the grand jury, or a justice of the peace, no person could be indorsed; and offenders of the highest nature would escape being brought to justice.

BY THE COURT.—It often happens that all the witnesses necessary to support a public prosecution, are brought unwillingly to give evidence; and the act could never intend there should be a prosecutor *indorsed, unless there was really a prosecutor existing, for the words in the act

*6]

(*a*) See the note to Weston *v.* Stammers, *ante*, 2. And see Weidman *v.* Kohr, 4 S. & R. 174.

(*b*) S. P. Motz *v.* Bolard, 6 S. & R 210.

(*c*) 4 Ann. c. 87; 1 Sm. Laws, 56

are, *the prosecutor*. And as no person in the present case is proved to be active in carrying on the prosecution, the defendant must plead to the indictment, without any indorsement.

It was then moved, that the defendant himself might be sworn to prove the person prosecuting; but denied by the Court, who said, it must be proved by indifferent witnesses.(*a*)

SEPTEMBER TERM, 1762.

NIXON and HARPER *v.* LONG and PLUMSTEAD.

Evidence.

THE protest of a master of a ship, allowed to be given in evidence.(*b*)

(*a*) There are many cases, however, in which a party to a suit has been admitted to prove facts not immediately connected with the issue. Thus, the service of notice to produce papers, may be proved by a party. (Jordan *v.* Cooper, 3 S. & R. 575.) So, the *loss* of a bill of exchange may be proved by the plaintiff, in an action against the acceptor, its previous existence having been proved. (Meeker *v.* Jackson, 3 Yeates 442.) So of a lottery ticket. (Snyder *v.* Wolfley, 8 S. & R. 328.) So, in Dehaven *v.* Henderson, *post*, p. 424, a plaintiff was admitted to prove the loss of an order given to him by the adjutant-general, for the restoration of property seized by the defendant, to let in evidence of its contents. So, a plaintiff has been admitted to prove the death of a subscribing witness to a deed, in order to let in evidence of his handwriting. (Douglass *v.* Sanderson, 2 Dall. 116, s. c. 1 Yeates 15.) But he is not competent to prove the handwriting of a witness to a deed (Peters *v.* Condron, 2 S. & R. 80); nor to prove the handwriting of a person (since dead) by whom the entries in his book were made. (Karsper *v.* Smith, 1 Bro. app. liii.)

And see Sneider v. Geiss, 1 Yeates 34; Miller *v.* McClenachan, Id. 144; Davis *v.* Houston, 2 Id. 289; Coxe *v.* Ewing, 4 Id. 429; Lodge *v.* Phipher, 11 S. & R. 333.

(*b*) In Cheriot *v.* Foussat, 3 Binn. 228 (in note), it is said, that upon searching the record of Nixon *v.* Long, it appeared, that the action was *covenant*, by the owners of a vessel against the charterers, to recover freight according to a charter-party, the plea, that the vessel returned empty and no freight was due, the replication, that it was by the default of defendants; and the master's protest, which was admitted in evidence, was made by himself *alone*. This decision has governed the practice of many subsequent cases in the *state* courts (see Story *v.* Strettel, *post*, p. 10; Brown *v.* Girard, 4 Yeates 115, s. c. 1 Binn. 40; Cheriot *v.* Foussat, 3 Binn. 227); though it has been followed with evident reluctance; and in the last reported case upon the subject (Gordon *v.* Little, 8 S. & R. 533), C. J. TILGHMAN remarked, "There are many objections to this kind of evidence. I never approved of it, and have been induced to consent to its admission, solely in compliance with the practice which had been established before I had a seat on this bench, and which I did not think myself at liberty to contradict. But as this practice is peculiar to Pennsylvania, and, in my opinion, productive of more harm than good, I cannot consent to its extension beyond its ancient bounds." In the circuit court of the United States for this district, although some doubt was expressed upon the subject in an early case (Ruan *v.* Gardner, 1 W. C. C. 145), it is now settled, that the protest is not admissible. Scriba *v.* Ins. Co. of North America, 1 W. C. C. 408, in note.[1]

[1] Of the case of NIXON *v.* Long, Chief Justice GIBSON remarks, in Fleming *v.* Marine Ins. Co., 3 W. & S. 151: "That a mariner's protest is competent evidence of the facts set forth in it, on the trial of an insurance case, is an anomaly peculiar to the laws of our own state; for it is elsewhere only one of the preliminary proofs of loss, which the assured is bound, by custom, or the terms of the contract, to furnish the insurer, before compensation can be demanded. And it is one which had its root in an imperfect note of an erroneous decision of this court, at a

APRIL TERM, 1763.

WILLIAM ALLEN, Chief Justice, WILLIAM COLEMAN, Justice.

The Lessee of FOTHERGILL and others *v.* CHRISTIAN STOVER.

Evidence.

A letter from the secretary of the land-office to a deputy-surveyor, stating that *James Logan* had agreed that A. should have 500 acres at C., and requesting him to survey it to A.; and a plot of survey made in pursuance thereof, not returned into office, but found among the papers of the deputy, after his death, admitted in evidence.

A LETTER from James Steel, receiver-general and secretary of the land-office, to the surveyor-general's deputy in Chester county, in these words: "Friend Isaac Taylor. Philadelphia, 3d, 2nd mo., 1719.—*James Logan* has agreed that the bearer hereof, William Willis, shall have 500 acres of land at
*7] Conestogoe. Please to survey it to him, and the warrant shall be ready. —Thy loving friend, *James Steel," offered to be given evidence as the foundation of the defendant's title. Objected on the part of the plaintiff, that James Steel, by his order only, without a warrant from the proprietors, or the commissioners of property, could not authorize the location of lands; and even supposing it to amount to an order from James Logan himself, as he was only one of three commissioners, such order cannot be a sufficient warrant.

BUT THE COURT said, that under these sort of orders from the proprietor's officers, a great part of the province had been settled, and that for the general convenience they had been heretofore allowed to be given in evidence, and particularly in *McDowell's case.* In that case, last April term, a letter from Richard Peters, secretary of the land-office, to the same effect as the above, was allowed; and the letter in this case was accordingly ruled to be given in evidence.

A plot of a survey, made in pursuance of the above letter, in Isaac Taylor's own handwriting, with a note at the bottom thus, "Sur. 9ber 10. 1720," and in the body of it, the words "William Willis, 400 acres," not returned into the surveyor-general's or secretary's office, but found among Isaac Taylor's land papers, many years after his death, was allowed to be given in evidence, against a regular warrant and survey, posterior to the above—a settlement and possession being proved to have been made—the first survey

---

time when its bench was not occupied by judges bred to the law. I believe, that neither of the judges who ruled the point in Nixon *v.* Long, had been admitted to the bar; yet, their decision, wrong as it palpably is, has been followed, till it has become too deeply rooted in precedent to be abruptly eradicated. This is remarkable: because the error was not merely speculative, but mischievous in practice. A protest is an act of the master and some of his people, all of whom are answerable to the owners for negligence, where it has existed; and it is consequently their interest to saddle the insurer with the consequences of it. In any circumstances, therefore, it is a dangerous sort of evidence; and the principle of Nixon *v.* Long, if not overruled, must be restrained to protests regularly made." And it was accordingly ruled, that to render a protest evidence for the assured, it must be made within twenty-four hours after the vessel is moored, on her arrival at her port of destination; or, certainly, before the goods have been landed, or the condition of the cargo ascertained; it is not enough, to note it within the twenty-four hours, if the extension of the protest be delayed till afterwards. In Thompson *v.* Johnson, 2 Cr. C. C. 107, it is said, that the master's protest may be given in evidence to corroborate his testimony.

amounting to an impropriation, and the land-office appearing to have been shut between the years 1718 and 1732.

N. B. On an appeal to the King and Council, the judgment of the supreme court was affirmed.(*a*)

Thomas Wallace *v.* Child and Styles.

Competency of witness.

In an action on a policy of insurance, the master of a ship, owning part of the cargo, insured by other underwriters, who refused to pay until the determination of this suit, was admitted a witness, swearing himself to be disinterested.

Suit on a policy of insurance. It was set forth in the declaration, that the vessel sprung a leak at sea, and put into Providence through necessity. The master of the ship was produced by the plaintiff as a witness, to prove the bill of lading, and to give a general account of the transactions on board the vessel and at Providence. His admission was opposed, because the captain himself had goods on board, which were insured, and the money was refused to be paid by the underwriters on his policy, until this suit was determined, and therefore he was interested. But it was answered, that the master of the ship was the only person who can be supposed capable of giving a full account of the matter: and part of the defense in this case being, that the goods insured were enumerated commodities, and therefore not lawful to be shipped from Carolina to Madeira; and the master's goods insured were not to be landed at Madeira, but at London; therefore, the master's insurance could not be affected by any determination in this case.

The Court ruled, that he should be examined on the *voir dire*, and if he said he was disinterested, he should be sworn in chief; which was done, and he was admitted a witness.

---

*Price *v.* Watkins. [*8

Vested legacy.

Devise of land, after the decease of the wife of testator, to trustees, to sell, and to divide the proceeds among his children, afterwards named, when they attained severally the age of twenty-one, or married; A., one of the children, attained the age of twenty-one, and died in the lifetime of the widow, and before sale: *Held*, that the legacy was vested.

Special verdict. The question arose on these words of a will. "*Item*—My will is, that after my wife Ruth Price's decease, or if she shall alter her condition and marry, then, in such case, I devise and bequeath unto my loving friends, I. W. and M. K., or to any one of them, in case the other should die, in trust, and for the intent to sell and convey, all that messuage, &c., to any person or persons that shall purchase the same, and the money arising from the sale of the premises shall be divided between my children hereinafter named, when they attain severally to the age of twenty-one years, or be married, which shall first happen." Samuel Price, one of the children, attained the age of twenty-one years and married, and afterwards died in-

---

(*a*) See McCurdy *v.* Potts, 2 Dall. 98; Sims *v.* Irvine, 3 Id. 425; Bond *v.* Seabold, 6 S. & R. 137; Miller *v.* Carothers, Id. 221; Farley *v.* Lenox, 8 Id. 392.

testate and without issue, in the lifetime of the testator's widow Ruth Price, who did never marry again. Then the widow died, and after her death, the trustees sold, and the administratrix of Samuel brings this suit for Samuel's proportionable part of the money arising from the sale of the house. And the question was, whether this was a vested legacy to Samuel, or whether it was lapsed, by his dying before the trustees had power to sell, to wit, in the lifetime of the testator's widow?

For the *plaintiff*, it was urged, that land ordered to be sold and converted into money, was to be considered as personal estate. That this land was to be sold at all events, so there was no contingency. That both events to make a vesting in Samuel had happened, to wit, attaining the age of twenty-one and marrying; and that this case was exactly similar to the case of *King* v. *Wilkes*, Talbot's Cas. 117. Besides which, many other cases were cited for the plaintiff, viz., 2 Vern. 536; 1 P. Wms. 109; 2 Id. 320; 2 Abr. Cas. Eq. 548; 2 Vent. 347; 2 Vern. 758, 766; 4 Bac. Abr. 308; 2 Vent. 366; 2 Vern. 72, 348, 424; 2 Abr. Cas. Eq. 654.

For the *defendant*, it was said, that in legacies to be raised out of land, the time of payment is the time of vesting. That in this case, the land could not be considered as personal estate, till the trustees had power to sell it, which was not until after the widow's death, and that Samuel dying before, his legacy was lapsed and would merge for the benefit of the heirs. And the case of *Oads* v. *Ferry* was much relied on, Vin., Devise, 383. The other cases cited for the defendant, were 2 Vern. 92, 416, 208; 2 P. Wms. 276, 610, 484; 3 Id. 20.

But the Court were clearly of opinion, that it was a *vested* legacy, and judgment was given for the plaintiff. (*a*)

---

*9] *APRIL TERM, 1764.

Present—William Coleman and Alexander Stedman, Justices.

The Lessee of Albertson *v.* Robeson.

Evidence.—Effect of the repeal of an act.

A person's age cannot be proved by hearsay, derived from his parents.

The Votes of Assembly are admissible, to prove the notification of the repeal of an act by the King and Council; so are the Minutes of Council.

The repeal of an act by the King and Council only took effect from the time of its notification here.

Moved to admit a witness to prove the age of the plaintiff, his brother (about sixty years old), from the hearsay of their father and mother. Opposed, and refused by the court. (*b*)

(*a*) Patterson *v.* Hawthorn, 12 S. & R. 112, *accordant.* And see Stone *v.* Massey, 2 Yeates 363.[1]

(*b*) In Strickland *v.* Poole, *post*, p. 14, hearsay was allowed to be given in evidence to prove *pedigree*; and the precedent has been followed in many cases.

[1] McClure's Appeal, 72 Penn. St. 414; McCall's Appeal, 86 Id. 254; Pechin's Estate, 8 W. N. C. 505; Linnard's Estate, Id. 536. And see Chess's Appeal, 87 Penn. St. 362.

King v. Haas.

The Votes of Assembly were admitted to prove the time of the notification of the repeal of an act of assembly by the King and Council. But not answering the purpose fully, the Minutes of Council were sent for, and given in evidence without opposition.

N. B.—The defendant supported his title under a decree of the court of chancery, established by act of assembly ;[1] the decree was made two months after the act was repealed by the King and Council, but six weeks before we had notice of it.

The Court gave it in charge to the jury, that the act was not repealed, till notification here ;[2] and the jury were of the same opinion, by finding a verdict for the defendant. (*a*)

The King *v.* Phillip Henry Rapp.

Continuance.

Indictment for misdemeanor, in marrying a man to a woman who had another husband living. Moved, on the part of the defendant, to put off the trial, on affidavit of material witnesses wanting, and that he had taken the proper steps to get them. Opposed by the attorney-general, as being a criminal case, and not within the rules of civil cases. But granted By the Court, the defendant being a clergyman, and his living depending on his acquittal : but declared not to be a precedent. (*b*)

The King *v.* Haas and others.

Practice on indictment.

Moved on the part of the defendant, to oblige the attorney-general to bring on the trial, or discharge the defendant. The Court said, they would not

---

(*a*) In Morgan *v.* Stell (5 Binn. 318), Judge Yeates has given a fuller account of this case, which is subjoined. "A case occurred in this court, a few years after I had commenced the study of the law, involving principles similar to those which form the subject of our present inquiry, and made a strong impression on my mind. It is briefly reported in 1 Dall. 9, and was in substance thus: Benjamin Albertson, claiming certain lands, by descent, in Bucks county, brought an ejectment against Septimus Robeson for their recovery. The title of the lands was clearly shown to have been, at one time, in the ancestor of the lessor of the plaintiff; but at a subsequent period, the lands were decreed to the defendant by this court, in pursuance of certain chancery powers delegated to them by an old act of assembly. The royal assent was refused to this law, in England, and it so happened, that the repeal preceded the decree of the court above two months, but the repeal was not known here, when the decree was made. The court determined, upon full argument, that the unknown repeal could not affect the right of the defendant, under the decree, and the jury found accordingly.[2] I well recollect that the decision gave general satisfaction to the profession." See also 4 Yeates 392. 1 W. C. C. 84.

(*b*) In Rex *v.* D'Eon, 3 Burr. 1513, the court said, that in all cases, whether criminal or civil, a trial shall not be hurried on, so as to do injustice to the defendant.

[1] Act 20 May 1715 (1 Geo. I. ch. 13), which was repealed by the King and Council, in 1719. P. L. 126 ; Old Province Laws, 359.

[2] People v. Trinity Church, 22 N. Y. 44.

force the Crown to bring on the *trial, nor discharge the defendant from bail, without some appearance of oppression. (*a*)

The Lessee of Richardson *v.* Campbell.

Evidence.

Evidence of parol declarations of one of the Proprietaries, respecting a sale of land, rejected.

Plaintiff supported his title by a patent dated in 1762. The defendant produced receipts from the Proprietary's officers, with a warrant from Mr. Peters, secretary of the land-office, several years prior to plaintiff's patent, and proved upwards of twenty years' possession; but the plaintiff contending, that the receipts were only for money paid on account of an adjacent tract, and that there was some imposition on the land-officer when the warrant was granted, the defendant produced a witness to prove a parol declaration of Mr. Thomas Penn (when he was in the country), that the land in dispute was sold to defendant. This piece of evidence was opposed by the plaintiff, and refused by the Court.

N. B.—The plaintiff could prove no imposition on the officer, and the court gave a charge in favor of the defendant, and the plaintiff would not take the verdict, but became nonsuit. (*b*)

Story and Wharton *v.* Amos Strettel.

Evidence.—Insurance.

Protest of a master of a vessel admitted in evidence.
A letter of instructions from the plaintiffs to the master of their vessel, admitted.
Insurance: total or partial loss.

Sur Policy of Insurance. The master's protest in Jamaica under the seal of a notary-public there, given in evidence to prove the capture, and not opposed. (*c*)

Instructions from the plaintiffs (owners of the vessel insured), to the master, at the time of his sailing, sworn by the master to be the only instructions he had, were given in evidence by the plaintiffs, to prove they had given the master no orders to buy the vessel on their account, in case of a capture and recapture, slightly opposed by defendant's counsel, and given up without debate. (*d*)

The defendant in this case underwrote an open policy on the vessel from Philadelphia to Jamaica, she was taken by the enemy and retaken, and carried into Jamaica, where by agreement between the master and recaptors, without going into the court of admiralty, she was sold at public sale

---

(*a*) But see the Habeas Corpus act of 18th February 1785. (2 Sm. Laws, 277.) And see the case of Commonwealth *v.* Prophet, 1 Bro. 135.

(*b*) See Strickler *v.* Todd, 10 S. & R. 63; Patton *v.* Goldsborough, 9 Id. 47; McWilliams *v.* Martin, 12 Id. 69.

(*c*) See the note to Nixon *v.* Long, *ante*, p. 6.

(*d*) See McClenachan *v.* McCarty, 2 Dall. 51, where a letter of instructions from the owners of a vessel (plaintiffs in the action) to the master, was admitted.

for about one-fourth of the sum insured, and bought by the master for the former owners, who afterwards acquiesced in the purchase, and now sued for the whole sum insured, as a total loss. The sale was proved to be fair, and the plaintiff's counsel insisted that, from the moment of the capture, there was a total loss, and cited divers cases to show, that if there be a capture, though it be not such a one as, by the law of nations, would change the property, yet it would be sufficient to charge underwriters with a total loss, and the assured may abandon. Beawes' Lex Mer. 268; Cunningham 225, 259, 300, 340.

*On the part of the *defendant*, it was insisted, that he ought to pay no more on this policy than the actual loss sustained by the payment of salvage and other charges. That the master having set up the vessel to sale, without any orders of the court of admiralty, and purchased her himself in behalf of the owners, for about one-fourth of the sum insured, and this being acquiesced in by the plaintiffs, there was no abandonment, and therefore but an average loss. [*11

THE COURT gave a charge in favor of defendant; and the jury accordingly gave the plaintiffs a verdict for so much only as they judged a compensation for salvage, charges and loss of time, on account of the capture. (*a*)

SEPTEMBER TERM, 1764.

WILLIAM ALLEN, Chief Justice, WILLIAM COLEMAN and ALEXANDER STEDMAN, Justices.

KING'S ROAD.

Road law.

The review of a road is a matter of right.

ON confirmation of a road by the justices of Chester county, the record was brought up by *certiorari*; and it was moved to reverse the judgment of confirmation, because the justices below had refused to grant a review, though petitioned thereto, by a person who complained he was aggrieved by the road running through his improved ground. On argument, THE COURT reversed the judgment for that reason, alleging that a review, though not taken notice of in the act of assembly, had always been granted, and was now become a matter of right. (*b*)

(*a*) See Bohlen *v.* Del. Ins. Co., 4 Binn. 444; Dutilh *v.* Gatliff, 4 Dall. 446; Curcier *v.* Phila. Ins. Co., 5 S. & R. 113; Brown *v.* Phœnix Ins. Co., 4 Binn. 445; Seton *v.* Del. Ins. Co., 2 W. C. C. 175, &c.

(*b*) In the cases of the Strasburg road (2 Yeates 53), and the Berlin road (3 Id. 263), it was also held, that a review is a matter of right for parties interested; and now, by the act of 1802, § 22 (3 Sm. L. 521), the quarter sessions are authorized and required to grant a review in all cases. A second review *may* be granted by the sessions (2 Binn. 250), but it is discretionary with them (2 Yeates 53). And see 1 Bro. 21C · 3 S. & R. 236.

Hugh Davey *et ux.* v. Peter Turner.

Deed of married woman.

A deed of the land a *feme covert*, executed by herself and her husband, and acknowledged by her before a judge of the court of common pleas of the county, to have been freely and voluntarily executed by her, by which the land was conveyed to trustees for the joint lives of herself and husband, &c., was *held* to be good, under the practice of the province.

This cause came before the Court for a determination on a special verdict, which found, that the defendant's late wife, Sarah, before her marriage, was seised of the lands in question in fee; that after her marriage with the defendant, she and her husband joined in a conveyance to two trustees and their heirs, "*habendum* to them and the survivor of them, and his heirs for ever, in trust nevertheless to and for the proper use and behoof of the said P. Turner and S., his wife, for and during their joint lives; and from and after the decease of either of them, then to and for the sole and proper use and behoof of the survivor of them, and his or her heirs for ever." That the
*12] said P. Turner and *S., his wife, appeared before W. P., Esquire, then one of the justices of the court of common pleas, for the county of Philadelphia, and acknowledged the said indenture to be their deed, and that the said Sarah was, then and there, secretly and apart from her said husband, examined by the said W. P., and on such private examination did declare, that she did sign, seal and execute the said indenture, with her full, free and voluntary consent, which acknowledgment and examination was then indorsed by the said W. P., under his hand and seal, upon the indenture. The special verdict goes on and finds, that for fifty years and upwards, it had been the constant practice and usage of the province of Pennsylvania, in cases where *baron* and *feme* have been desirous to settle, sell and dispose of the estate of the *feme*, for the *baron* and *feme* to join in a deed or deeds, and for the *feme* to go before some justice of the peace, in the county where the lands lie, out of court, and for the said justice to examine such *feme* in private and apart from her husband, respecting her signing and executing such deed, and to interrogate her, whether she became a party to and executed such deed, with her full and free consent, and on her declaration that she freely consented, for the justice to certify the same under his hand and seal. And that a great number of titles to valuable estates in this province, were held under, and did depend upon, deeds executed by *baron* and *feme*, in manner aforesaid. And that the titles to such estates had never before been called in question, but that such deeds of *femes covert* and their husbands had always been allowed to be given in evidence in courts of justice; that scriveners had generally conducted themselves by this usage, in transferring estates, and that only two fines had ever been levied in this province for conveying the estates of *femes covert*. The jury further found, that the said Sarah died, without having any issue born alive, and the plaintiff's wife was one of her heirs-at-law.

The principal question was, whether this mode of conveyance of the estates of *femes covert* could be supported by the usage, as found by the jury.

On the part of the *plaintiff*, it was urged, that by law a *feme covert* cannot convey her estate but by fine, in which she must be examined by writ; that the usage in this case was not sufficient to alter the law, not being from

time immemorial, and was unreasonable, because it had no lawful commencement, a *feme* being supposed by the law to be under the coercion of her husband: and for this purpose Godb. 143, was cited. That supposing the custom good, the deed in the present case was variant from the custom as found in the special verdict; for that the usage ratified this kind of conveyance only in such cases, where the *feme* was willing and desirous to convey, and where she declared she became a party to the deed freely: and that it is not found the *feme* in this case was willing and desirous, and had declared she became a party thereto; for though it is set forth, that she declared she executed the deed freely, yet it does not appear the deed was read, or the contents made known unto her, * without which she could not be said to become a party. Another variance insisted on was, [*13 that the examination required by the custom must be by a justice of the peace, and in this case W. P. is not said to be a justice of the peace, but a justice of the court of common pleas. It was further urged, that the deed in this case was void, for two reasons: 1st. Because, though the conveyance is to trustees, yet the use is to the *baron* and his heirs, which, by the statute of uses, vests the legal estate immediately in the *baron*, and so is no other than a conveyance from the *feme* to the *baron*, which is void. The second reason was, that the deed wanted a consideration, there being none mentioned but marriage and five shillings. That the marriage was past, and a past consideration is no consideration, and the five shillings said to be paid to the *feme* was in fact the property of the husband, so no consideration to her.

On the part of the *defendant*, it was answered, that, though by the law of England, a *feme covert* cannot convey her estate, without an examination by writ, yet in this country a different manner of examination has obtained from the first settlement of the province, in substance, the same as an examination on a fine, which probably, in early days, could not be levied here for want of skill in the professors of the law; and that now the greater part of the titles in the province depend, in some link of the chain, upon this kind of deeds, it would be highly inconvenient, and would introduce the utmost confusion, to overset them. That common recoveries have their validity from usage, and that if this be an error, it is within the maxim, *communis error facit jus*. As to the reasonableness of the usage, Brooke, tit. *faits*, § 14, 15, was cited, to show that an examination of a *feme covert* before the Lord Mayor in London was good, without a fine. And to show the force and extension of the maxim, *communis error facit jus*, many authorities were cited. Carth. 283; 4 Sid. 190; 2 Mod. 238; Jenk. 162, 250; Anderson 49; 2 Abr. Eq. Ca. 200; Hob. 83; Salk. 33; Co. Litt. 112; Shepherd's Touchstone 516; Comb. 320, 342; Stiles 320. As to the variance between this case and the usage, it was said, the *feme* had declared she executed the deed with her free consent, and that it must be taken, the magistrate did his duty in making her acquainted with the contents. As to the other variance, it is notorious, that a justice of the common pleas is a justice of the peace, in this province, being appointed to both offices in one commission, and the court will *ex officio* take notice of so general a practice. As to the objections against the validity of the deed, it was answered, that though a deed would be void immediately from *baron* to *feme*, yet it would be good, when made to trustees to the use of the *feme*: Co. Litt. 112. And the considera-

tion of five shillings, though not a valuable one, is a good consideration in the eye of the law.

By the Court, after advisement.—These deeds, and this mode of examination of *femes covert* on conveying their estates, having generally prevailed in this province, from its settlement, and undergone, from time to time, the notice *of the courts of justice, it would be very mischievous now to overturn them. The maxim *communis error facit jus* cannot operate more properly than in this case, and the court unanimously adjudge the law to be with the defendant. (*a*)

*14]

SEPTEMBER TERM, 1765.

Present, William Allen, Chief Justice, William Coleman and Alexander Stedman, Justices.

The Lessee of Strickland *v.* Rebecca Poole.

Hearsay.

To prove pedigree, evidence permitted to be given of *hearsay*, a great while ago, before any dispute stirred. (*b*)

SEPTEMBER TERM, 1766.

Present, William Allen, Chief Justice, William Coleman and Alexander Stedman, Justices.

The Lessee of Thomas *v.* Horlocker.

Ancient deeds.

Plaintiff produced a deed, bearing date sixty-three years ago, appearing on inspection to be ancient; one of the witnesses proved to be dead, the

---

(*a*) In the case of Lloyd *v.* Taylor, *post*, p. 17, a deed by the wife of her lands, without any separate examination, was sustained, on the same ground of *communis error;* and these cases have been recognised, and the principle upon which they were decided, adopted by Judge Washington in Milligan *v.* Dickson, 1 Peters' C. C. 438. "This usage," said that learned judge, referring to the practice of acknowledging letters of attorney, "forms one of the great and essential land-marks of real property in this state; and if the titles depending upon it are to be uprooted at this day, I will not be the judge to commence the work of devastation. Never was there a case where the principle *communis error facit jus* was more strictly and necessarily applicable." In 1770, the legislature passed an act confirming titles derived from *femes covert*, where there had been no separate examination, and established a mode by which the husband and wife might thereafter convey the estate of the wife (1 Sm. L. 307). The decisions under this act have settled the principle, that the wife's acknowledgment must appear, on the *face of the certificate*, to have been made substantially as the act requires; and parol evidence is not admissible to supply defects in the certificate. And it must appear, that the acknowledgment was made before the proper officer, in his proper county. (See 5 Binn. 296; 7 S. & R. 43.) The act of 3d April 1826 (P. L. 187), provides that no *bonâ fide* conveyance, previously made, shall be held invalid, by reason of any informality or omission in setting forth the particulars of the acknowledgment; but the case of an acknowdgment before an incompetent officer seems not to have been provided for. See also 1 Binn. 470; 4 S. & R. 273; 5 Id. 289; 6 Id. 49, 143; 9 Id. 273; 14 Id. 84; 15 Id. 71.

(*b*) See Albertson v. Robeson, *ante*, p. 9.

other not known. Possession had not attended the deed, and no other account was given of it, or the witnesses, than by the evidence of a person who swore he had well known one of the witnesses, and had seen many deeds and papers signed by him, and from thence believed his name to this deed, to be of his handwriting, but had never seen him write. THE COURT, on debate, thought this a sufficient proof of the deed, considering its *antiquity*, and it was read in evidence.

---

*SEPTEMBER TERM, 1767. [*15

Present—WILLIAM ALLEN, Chief Justice, WILLIAM COLEMAN, JOHN LAWRENCE and THOMAS WILLING, Justices.

BOEHM and SHITZ *v.* ANDREW ENGLE.

Limitations.

The Statute of 32 *Hen. VIII.*, c. 2, extended to Pennsylvania.

ACTION on the case for 802*l.* The plaintiffs under a power in the will of Henry Bolster, deceased, had sold at public vendue, to the defendant, a house and lot in the city of Philadelphia for 802*l.*, and shortly after tendered him a deed for it, which the defendant refused to accept, being advised by counsel that Bolster had no good title to the lot. Upon which, the plaintiffs brought a special action on the case for the consideration-money.

On the trial, in support of Bolster's title, the plaintiffs produced a patent to Jane Batchelor, dated 1694, and a deed from one Richard Tucker (who had married Jane Batchelor) to John Chambers, dated 1685, and deduced a regular title from Chambers down to Bolster. The plaintiffs acknowledged the defect in the title, in Tucker's conveying his wife's estate, without her joining in the deed, but insisted on sixty years' *possession*, as giving a good title under the statute of 32 *Hen. VIII.*, c. 2.

The counsel for the *defendant* denied the extension of that statute, and urged, that if the 32 *Hen. VIII.* extended, the statute of 21 *Jac. I.*, c. 16, likewise extended, being both made before the settlement of the province, but it appears to have been the opinion of the legislature of this province, that these statutes of limitations did not extend, by their having made an act to limit *personal actions* in the very words of the statute of *James.* (*a*) It was likewise contended, on the part of the defendant, that though the statute of 32 *Hen. VIII.* should be extended, yet this case was not within it; because, 1st, The act was made on a presumption that there might have been regular conveyances and lost, but here it appears there was no conveyance at all from the wife, by Tucker's granting for himself *and his wife.* 2d. There is no proof of sixty years' possession, the witnesses for the plaintiffs speaking only to 44 years back. 3d. The act of 32 *Hen. VIII.* does not operate, unless sixty years elapsed *since right of entry accrued*, and here Tucker's wife had no right of entry until the death of her husband, which was in 1708, and not sixty years ago. There was another point made for the de-

---

(*a*) 12 *Ann.* c. 2; 1 Sm. L. 76; and 1 *Geo. I.* c. 8, § 6; 1 Sm. L. 91.

fendant, that in one of the mesne conveyances, about sixteen years ago, the wives of the grantors had not joined in the deed, and were now living and consequently, might be entitled to dower.

*16] *For the *plaintiffs*, it was answered, that in 2 P. Wms. 75, and many other cases, it was settled, that all acts of parliament made before the settlement of the colony, extend, unless local in their nature; that under this rule, the statute of wills, statute of uses, and many other statutes, were always held to extend; and that the reason of this act extended as well as any other. That as to this case not being within the act, the presumption spoken of was not justified by the act itself, which extended to every case. 2d. Though the witnesses swear only to forty-four years' possession, yet after such a length of time, it should be presumed the possession had been from the date of the deed to Chambers, which was in 1685. 3d. The rights of *femes covert* are not saved in this act (except such *femes covert* as were in being at the time of making the act), and possession was out of Tucker's wife from the time of her husband's deed to Chambers. As to the last point, it was said, that it was picked up at the bar, and not objected to at the time of tendering the deed: that it did not strictly go to the title, but was only a claim of two old women for their lives, which the jury might take notice of, if they pleased, by lessening the damages.

The Court were unanimous and clear in their opinion, that the act of 32 *Hen. VIII.* did extend to this province, and gave it in charge to the jury accordingly.

The verdict of the jury was conformable to this opinion, by their finding for the plaintiffs, having made an allowance for the lives of the two women in the damages. (*a*)

APRIL TERM, 1768.

William Allen, Chief Justice, John Lawrence and Thomas Willing, Justices.

Riche and Richards *v.* Broadfield.

Evidence.

An account of sales of an adventure shipped to New York, said to be signed by the factor, offered in evidence, to prove a loss on the goods. Objected, that the factor himself ought to have been brought to give evidence, *vivâ voce*, or, at least, the account should have been proved by him, and certified under the city seal of New York, agreeable to the directions of the act of parliament with regard to the proving colony debts in England. Answered, That this being a mercantile transaction, such evidence as merchants usually admit as proofs of a foreign transaction, should be received here.

(*a*) The same point was ruled in Morris *v.* Vanderen, *post*, p. 67. The act of 1785 (2 Sm. L. 299), passed since these decisions, has superseded the British statute.

Lloyd v. Taylor.

*By the Court.—The strict rules of law with regard to evidence ought not to be extended to mercantile transactions.(*a*) In this case, on proving the handwriting of the factor, let the account of sales be given in evidence; which was accordingly done.

John Swift *v.* Hawkins and others.

Equitable defence.

In Pennsylvania, on the plea of payment, to debt on bond, the defendant may give in evidence want of consideration.

Debt sur Obligation. On the plea of payment, defendants offered to give no consideration in evidence. Objected, that the consideration of a bond is not inquirable into, the passing the bond being a gift in law of the money. To this it was answered, and so ruled by the Court, that there being no court of chancery in this province, there is a necessity in order to prevent a failure of justice, to let the defendants in, under the plea of payment, to prove mistake or want of consideration. And this, the Chief Justice said, he had known to be the constant practice of the courts of justice in this province, for thirty-nine years past.(*b*)

For the plaintiff, the following cases were cited: Plowd. 309 *b*; Gilb. Rep. 154; Hard. 200; 3 P. Wms. 222.

The Lessee of Thomas Lloyd *v.* Abraham Taylor.

Deed of feme covert.

A deed by a *feme covert*, without acknowledgment, supported, on the usage of the province.

Ejectment for ground in the city of Philadelphia. Mercy Masters, being seised in fee, married Peter Lloyd. Peter Lloyd and Mercy, his wife, convey to Ralph Asheton, in 1727. Ralph Asheton reconveys to Peter Lloyd, the land in question. Afterwards, in 1738, on a judgment against Peter Lloyd, the land in question was taken in execution and sold by the sheriff to the defendant for 1300*l*. Plaintiff claims as heir-at-law to Mercy Lloyd, insisting, that his mother being a *feme covert*, could not legally convey her estate, with-

---

(*a*) S. P. Arnold *v.* Anderson, 1 Yeates 94.

(*b*) The same point was ruled in Swift *v.* Jones *et al.*, at the same term (April 1768); a report of which is contained in Mr. Rawle's MS. collection. The question was fully argued by Messrs. *Chew* and *Tilghman*, for the plaintiff, and Messrs. *Ross*, *Galloway* and *Waln*, for the defendants, and the court having admitted evidence to invalidate the consideration, a verdict passed for the defendants. Since these decisions, the law has been considered settled in the state courts. "This case (says Judge Duncan, speaking of Swift *v.* Hawkins, "may be called the *Magna Charta* of this branch of equity, and has been ever since followed, and rules of court universally established, requiring notice of the special matter, fraud, or failure of consideration, intended to be given in evidence in avoidance of the bond." Mackey *v.* Brownfield, 13 S. & R. 240. This practice has been adopted by the circuit court of the United States for the Pennsylvania district. See Latapie *v.* Pecholier, 2 W. C. C. 180.

out an examination by writ. And though in the case of *Davey* v. *Turner*, tried in this court September 1764 (*ante*, p. 11), it was ruled, that an acknowledgment of the deed, on a private examination before a justice of peace, was sufficient, under a long usage, to sanctify her deed, though not strictly agreeable to law; yet, here, there was not even that acknowledgment or private examination.

But it appearing in evidence, that it had been the constant usage of the province, formerly, for *femes covert* to convey their estates in this manner, without an acknowledgment or separate examination; and that there were a great number of valuable estates held under such titles, which it would be dangerous to impeach, at this time of day, THE COURT gave a charge to the jury in favor of the defendants, founded on the maxim *communis error facit jus*. And the jury accordingly found for the defendant.(*a*)

---

*18] *APRIL TERM, 1773.

CHESTER Nisi Prius, August 24, 1773.

The Lessee of the PROPRIETARY *v.* RALSTON.

Ejectment.—Evidence.—Practice.

After giving evidence of title in a third person, the defendant may move for a nonsuit.
The plaintiff cannot demur to the defendant's evidence, before he has gone through the whole.
A letter from the plaintiff's ancestor is not evidence, in his own behalf, to prove the defendant's grant to have been conditional.

PLAINTIFF showed a title in himself to the province of Pennsylvania, and then rested. Defendant showed a deed for one thousand acres of land; also a warrant to himself and two others to take up three thousand acres of land, which included the lands in controversy; also a power of attorney to David Lloyd to take care of said land, and an account of the expenses of survey.

Defendant having shown title in a third person, as he conceived, moved for a nonsuit, and as authorities, cited Bull. Nisi Prius; Instit. Leg., title Eject.

Plaintiff's counsel insisted to know whether the defendant had gone through all his evidence, and said that he was not entitled to the opinion of the court until then, upon his title in a third person.

BUT THE COURT determined *contrà*; and then gave their opinion that, as the defendant's deed was a conditional deed upon the face of it, he was not entitled to a nonsuit.

The plaintiff's counsel then contended, that they had a right to demur to

---

(*a*) This case appears, from a MS. report, to have been argued at great length, by Messrs. *Dickinson* and *Waln*, for the plaintiff, and by *Chew* and *Tilghman*, for the defendants. In the course of the trial, parol evidence was offered to show that, after the execution of the deed, Mrs. Lloyd expressed her dissatisfaction with it, and declared that she did not intend to disinherit her issue; but after argument, the evidence was rejected. See the note to Davey v. Turner, *ante*, p. 11.

the defendant's evidence. This was opposed by the defendant's counsel, who insisted, they had a right to go through their evidence, before the demurrer was allowed. Of which opinion THE COURT also was; and the defendant proceeded with his evidence, among which was a letter from William Penn, the first, acknowledging this sale and grant.

The plaintiff afterwards offered a subsequent letter of William Penn's, declaring the grant to be conditional; and, as this condition was not performed, the grantees should not have the land. This the defendant's counsel opposed, on the principle that no man could create evidence for himself.

Tilghman.—Letters are like conversation, when the whole must be given.

Dickenson, on the same side, offered these authorities: 12 Vin. 101. An old manuscript, evidence. Id. 247. The declaration of a woman *present at the birth of a child, in proof of pedigree, 3 Mod. 36; to show [*19 that the defendant's rule of evidence is too strict.

Upon full argument, THE COURT overruled the evidence, upon the principle contended for by the defendant's counsel.

Some of the defendant's counsel, the next day, offered some of Doctor Coxe's letters to David Lloyd, showing that the condition had been complied with.

But THE COURT adhered to their opinion, and overruled these letters also. A verdict passed for the plaintiff (*defendant*), by which the sense of the jury was, that the non-performance of conditions of settlement did not avoid the grant.

APRIL TERM, 1773.

The Lessee of BIDDLE *v.* SHIPPEN.

Evidence.—Limitation.

A map of the town of *Germantown*, made about thirty years back, ruled not to be good evidence. The stat. 21 *Jac. I.*, c. 16, ruled to extend to Pennsylvania.

THE plaintiff, among other evidence, offered a map, made by one Zimmerman, about thirty years ago. One John Knorr, Zimmerman's nephew, proved that said map was the work of his uncle, at the request of the people of Germantown; that his uncle dying, before he was paid for it, it remained in the family; that it contains the lines of the Germantown lots, and the adjacent out-lands; that, upon any difficulty, they apply to him, and this map generally determines any dispute they may have about their lines.

Mr. *Chew* opposed this map, at first, but afterwards agreed that the lands in controversy were as laid down in it, and admitted it with a salvo of its being no precedent. Upon the plaintiff's offering it to the jury to take out with them, Mr. *Chew* opposed it, and some difference arising, THE COURT declared it was not proper evidence, that they should not have al-

lowed its being offered to the jury, nor would they suffer them to take it out with them.(*a*)

*20] But THE COURT also declared, that the statute of 21 *Jac. I.*, c. 16, of twenty years' possession, extended here; and that it had never been doubted.(*b*)

BUCKS Nisi Prius, OCT. 15, 1773.

ANONYMOUS.

Descent.

Land *devised* to a child, who dies intestate, is to be distributed according to the intestate law.

JOHN FISHER, having two sons and a daughter, made his will, and devised a plantation to his son Matthias in fee. Matthias dies in his minority, intestate and without issue.

Question: Whether his heirs at common law shall take; or it shall divide among his other brother and sisters, under the supplemental intestate law of this province?

On a trial in ejectment for the plantation, it was agreed by counsel, that the opinion of the court should be conclusive to the jury.

Mr. Justice WILLING and Justice LAWRENCE were of opinion, and so delivered it to the jury, that the estate should be divided: and the plaintiff suffered a nonsuit.(*c*)

SEPTEMBER TERM, 1774.

Before CHEW, Chief Justice, WILLING and MORTON, Justices.

HURST *v.* DIPPO.

Demurrer to evidence.

The list of first purchasers under William Penn, admitted in evidence.
A deed produced in evidence and demurred to, must be set forth *in hæc verba*, on the demurrer.

TRESPASS.—The plaintiff's counsel opened, that William Penn, by deed of lease and release, granted to his ancestor, A. Sonmans, five thousand acres

---

(*a*) See Griffith *v.* Tunckhouser, 1 Peters' C. C. 418; Jones *v.* Bache, 3 W. C. C. 199.

(*b*) In Morris *v.* Vanderen, *post*, p. 67, C. J. MCKEAN said, that the statute 21 *Jac. I.*, c. 16, was *not* in force in Pennsylvania. Its principal provisions are contained in the act of 27th March 1713. 1 Sm. Laws 76.

(*c*) This case (under the name of Heister's Lessee *v.* Lambert) was cited by C. J. MCKEAN, in Kerlin *v.* Bull, *post*, p. 177. And although it was objected, that the decision was made on a sudden, and without deliberation, by judges who did not pretend to be skilled in the law, yet the determination in Kerlin *v.* Bull went mainly on this precedent. See also Larsh *v.* Larsh, Addison 310.

of land in Pennsylvania; that such deeds were lost or otherwise mislaid; and to prove the existence of such deeds, he showed a list of names, commonly called the list of first purchasers, and containing a warrant, signed and sealed by William Penn to *his surveyor-general, to survey the several quantities of land there mentioned; which the plaintiff [*21 contended was good evidence to prove his title. Defendant demurred to plaintiff's evidence.

A question then arose, whether it should be stated that the plaintiff's ancestor, A. Sonmans, was seised in fee, by virtue of a grant from William Penn; or whether the list of purchasers should be set forth *verbatim?*

After long debate, THE CHIEF JUSTICE gave the opinion of the Court, as follows:

CHEW, Chief Justice.—Though demurrers are disused, yet the law is not uncertain. It is a settled rule that courts of law determine law; a jury, facts. Upon which maxim every security depends in an English country.

When a deed is produced in evidence, it must be shown *in hæc verba* on the demurrer. There is a difference between *Baker's Case* as reported in Croke and Coke; but it is law, that when facts are attempted to be proved by witnesses, the fact must be admitted; but previous to the admission of a fact, circumstances or evidence must be shown, tending to prove such fact. There may be a demurrer to evidence, either parol or written; and there may be written evidence to prove a fact.

The difficulty in this case is, whether this list of purchasers is sufficiently descriptive of the nature of the estate, in the deed referred to. We must, for the security of the province, take notice of the circumstances of this province. It is well known, what kind of a transaction this was. William Penn, soon after his grant from the Crown, sold lands in small parcels. It appears, he made deeds for sundry small parcels of land, and received the money. These grants were in the province at large; the party must do something more to appropriate the land. By this list, he expressly says, it is an account of the lands granted to purchasers; is it not then a proof that William Penn made a grant, among others, to A. Sonmans, for five thousand acres of land in Pennsylvania?

It sufficiently appears a deed did exist; but it may be asked, what was the nature of that deed—what kind of an estate passed by it? Whether it is proper to go out of the evidence may be qnestionable. The word *purchase*, however, implies a purchase in fee; and there is no instance where any other estate was granted. Besides, the custom of the province, in the like cases, shows what was the nature of the purchase.

The Court do not take upon themselves to say what the deed was; and, under all the circumstances of the case, we think it not proper to insert this list in the demurrer. If the defendant's counsel will not agree to state an estate in fee in the plaintiff's ancestor, it must go to the jury to draw their inference of the nature of the estate, from the evidence laid before them.(*a*)

(*a*) The "*list of first purchasers*," which appears to have been received in evidence in this case, was also admitted in Morris *v.* Vanderen, *post*, p. 64, after argument, and is said by C. J. TILGHMAN, in Kingston *v.* Leslie (10 S. & R. 387), to have been "often since received without opposition."

* APRIL TERM, 1776.

Before CHEW, Chief Justice, and LAWRENCE, Justice.

STEINER *v.* FELL and others.

Removal of cause.

When the defendant takes out a *habeas corpus* to remove the cause, and the plaintiff subsequently procures the allowance of a *certiorari*, the court will give preference to the prior writ.

PLAINTIFF brought an action of debt on an arbitration bond, in Bucks county common pleas. Defendant pleaded *nul award:* plaintiff replied, and set forth an award. In September term, 1775, plaintiff got a rule for rejoinder in six weeks, or judgment. Before the six weeks expired, defendant's attorney gave him a rejoinder, and at the same time, showed him a *habeas corpus*, by which he intended to remove the cause to the next supreme court. Plaintiff, choosing that the proceedings should go up above, as they were below, took out a *certiorari*, and going into court, the first day of the term, got it allowed. The next day, the defendant presented the *habeas corpus*, to which plaintiff's attorney objected, for that the record was removed by the *certiorari*. The court below agreed to send up both writs, and let the supreme court receive the record on which they pleased.

Now, it came on to be argued, and the plaintiff's counsel contended, that the record should be received only on the *certiorari:* 1. For that, when the other writ was presented, there was no record before the court, on which the *habeas corpus* could operate, and that the power of the court below was exhausted. 2. That if that could not be allowed, yet both writs might be returned, *reddendo singula singulis;* the *certiorari* might remove the cause, and the *habeas corpus* the body; and there was no inconsistency in so doing.

The defendant's counsel rested it on the advantage taken of him, and on the constant practice of the court with respect to the writs of removal.

BY THE COURT.—Whenever a writ issues fairly, if it is first delivered, it shall take preference. The proceedings on a *habeas corpus* are *de novo;* on a *certiorari*, the court proceed on the state returned. Therefore, both writs cannot issue in the same cause; for the court cannot proceed *de novo*, and on the old record too; which, upon the idea of returning both writs, must be done. In this case, the defendant not having affected delay,
*23] but proceeded in the *usual course, having taken out the first writ, and delivered it as soon as was usual, his writ should take preference; and the Court accordingly order the return to be made on the *habeas corpus*.

Wheeler, Assignee of Baynton, *v.* Hughes, Executor.

Defalcation.

The assignee of a bond takes it at his own peril, and stands in the place of the obligee, so as to let in every defalcation which the obligor had against the obligee, at the time of the assignment, or notice of the assignment.

John Hughes, the 16th of February 1763, gave his bond to John Baynton, conditioned for the payment of one thousand pounds. On the 3d September 1764, John Baynton and Samuel Wharton became bound, jointly and severally, to John Hughes, in a bond conditioned for the payment of six hundred and eight pounds, fifteen shillings. On the 8th of May 1765, John Baynton assigned the one thousand pound bond to the plaintiff, Ann Wheeler, for a just debt, she being ignorant of any dealing between Hughes and Baynton. This action was brought on the assigned bond; the defendant pleaded payment, and offered in evidence the bond dated in September, in bar of the plaintiff's recovery. To this the counsel for the plaintiff objected, and this day, viz., 23d April, the cause came on to be argued.

The counsel for the *plaintiff* (Messrs. *Peters* and *Read*) contended, that by the act of assembly,(*a*) bonds, bills and notes were negotiable, as promissory notes in England, under the 3 & 4 *Ann.* c. 9; that negotiability imported a currency from hand to hand; that this act of assembly was formed on the plan of the statute, in many places using the same words, and being made for the same purpose, viz., *to encourage trade and commerce*, which could only be effected by such a construction, as that an assigned bond should have a currency from hand to hand, and that the possessor should recover, independent of any contracts or dealings between the obligor and obligee; that the clause in the act of assembly, "should commence and prosecute his, her or their actions at law, for the recovery of the money mentioned in such bonds or notes, or so much thereof as shall appear to be due at the time of such assignment," meant, as shall appear on the face of the instrument itself. That, for this reason, the obligor should either guard, in making the contract, by leaving out the negotiable words, or should get his payments indorsed on the bonds; that the words, "to recover as the person or persons to whom the same was or were made payable," only referred to the mode of recovery, where the assignee brought his action in his own name, as he might under this act. That any other construction would defeat the intention of the act, which was to encourage trade and commerce; but if the assignee was to take the bond subject to the dealing between the obligor and obligee, there was an end of this species of traffic, as no one would ever take an assigned bond, in the course of trade, or in any other case, but of a doubtful or desperate debt.

To show that a third person, coming in *bona fide*, and for a valuable consideration, would be in a better situation than his vendor, the [*24 *following cases were cited: 1 Siderfin 134; A. made a foeffment to B. by covin; B. makes a foeffment to D., for a valuable consideration and *bona fide*; the first foeffor enters and makes a foeffment for a valuable consideration: the foeffee of the first foeffee shall retain the land. Cro. Jac. 32; debt on obligation for two hundred pounds; defendant pleads the statute

(*a*) Act 28th May 1715. 1 Sm. L. 90.

of usury, and shows that he was indebted to one Alder, in one hundred pounds, and agreed with him, that he should forbear him for a year, in consideration of thirty pounds, and that he should make a bond to Alder for the payment of thirty pounds, and for payment of one hundred pounds; that then he and Alder entered into the bond for two hundred pounds: the plaintiff replied, that Alder was justly indebted to him in one hundred pounds, and for payment thereof entered into this bond, that he was not knowing to any corrupt agreement between the defendant and Alder: the court determined in favor of the plaintiff, upon his being a fair and innocent creditor. To show that promissory notes in England are not subject to any discount or set-off, between the promisor and promisee, the following cases were quoted. 1 Salk. 126; Bill lost; finder transfers it to C. for a valuable consideration; the original owner cannot bring trover against C. 1 Burr. 459. s. p. 1 L. Raym. 738; 2 Burr. 675–6, 1224, 1227; 2 Freem. 257. Bill payable to A. or bearer, is like so much money paid to whomsoever the note is given; that let what discount or conditions soever be between the party who gives the note, and he to whom it is given, yet it shall not affect the bearer. 3 Bac., title Merchant; Comyns 43; Marius 72; 3 Burr. 1523, 27, 29.

It was contended farther by the *plaintiff*, that the act of assembly had changed the nature of these contracts; that they were not to be construed on commercial principles only; that the doctrine of the defendant established this principle, that it was *nudum pactum*, there was no consideration at the time of the bond being given or assigned. To which it was answered, that, judging on commercial principles, a want of consideration was no objection, for there is no such thing as *nudum pactum* in mercantile transactions. 3 Burr. 1669. Plaintiff also denied defendant to be within the defalcation act.

The counsel for the *defendant* (Messrs. *Clymer* and *Fisher*) contended, that it was not the intention of the legislature to make bonds negotiable here, as promissory notes in England. They allowed the law as laid down in the above cases, but denied the application; insisting that they stood upon quite a different footing. That nothing more was meant by the act, than to give assignees the benefit of suing in their own names, and preventing any release or other dealings, affecting the assignee, after assignment once made; that in England, a bond passes into the hands of an assignee, subject to all the equity it had in the hands of the assignor, for which they quoted 2 Vern. 692, 675; 10 Mod. 445; 1 P. Wms. 383, 452, 459. That the construction contended for by plaintiff, would open a door to numberless frauds; that a satisfied bond might be passed away, and the obligor compelled to pay it twice; that even a forged bond might pass in the same *manner; that the preamble has little weight in the construction of a law, being often made by the clerks in parliament; that trade and commerce would be best promoted by their construction, as it would only impose a duty on a person taking a bond, to inquire in what state it stood.

*25]

That in case of bonds mislaid or lost, no money could be paid on them; that the intention of the legislature was to make these bonds, bills, &c., subject to a common-law remedy, and substitute the doctrine of the courts of equity in England in this province, and no farther. That it was evident that a general negotiability was not intended; if it had, the legislature would not have varied the expression in those parts of the statutes, expressly refer-

ring to inland bills of exchange, and making promissory notes negotiable as bills of exchange; the act of assembly, on the other hand, expressing such a recovery by assignee, as the assignor could have had, and confining the recovery to such money as was due at the time of the assignment. That this was further confirmed by the last clause of the act, which prohibits the assignee releasing any money, actually or really due. That custom and practice, which are good expositors of laws, are with them; and that the statute of 4 & 5 *Ann.* being declared on, shows it was the sense of the practitioners, that promissory notes are not negotiable here, as in England. That as to the defalcation act, it is a remedial law, and to be extended by equity to all cases within the same mischief; that though that part of it which gives a *scire facias*, does not apply to this case, yet the other part does; and the defendant is fairly within the reason of it.

The counsel for the *plaintiff*, in reply, admitted the law in England, as laid down by the defendant, in the case of bonds; and, that before the statute, promissory notes were only evidence of a debt; there was no property transferred; but that the act of assembly and act of parliament, being made *in pari materia*, are to receive the like construction. That the construction made by the defendant, would render the act nugatory. That merely to give the assignee a right of suing in his own name, unless some solid advantage attended it, was trifling, nor would it at all encourage trade and commerce. That a limited negotiability was an absurdity; it must be negotiable, or not; if negotiable, it was so in all cases, when honestly come by, or not at all. That the intention of the act must wholly fail, if assignee is only to stand in the place of assignor, and his recovery made to depend on circumstances and proofs, which, in the nature of things, are not in his power. That to say the assignee must make inquiry, before he meddles with the bond, is begging the question. We contend, that this act of assembly meant something, and that was, for the sake of trade and commerce, to annex a property in the debt, and a currency to the paper, and to improve vigilance in the debtor, to take care either to guard his contract in the first instance, or in case of payment, or other satisfaction, to see his payments indorsed, or his bond cancelled.

*That there is no ground for supposing that the intention of the law was only to give a chancery jurisdiction; because there was a chancery in this province until the year 1718; since this act passed, and as soon as ever the chancery powers ceased to be exercised, the courts of law took them, and have exercised them to the great satisfaction of the province. That, if they were competent in one case, they were also in another; and they have in many instances gone much further than in this. That, in construing this law, we are to regard the state of the province at that time. There was little specie; no paper currency; a medium of trade was wanted; the act of parliament had shown how promissory notes had been made a medium of commerce; they took it for their guide, and extended it to bonds and penal bills. That the variance in wording the act is easily accounted for. Foreign bills of exchange were not in much use, inland bills not known; to have used the language of the act of parliament, would have been penning laws in a language not understood, and it would be absurd to refer to a species of contracts known and understood by very few in [*26

the province. That custom and practice is with the plaintiff, as there is scarcely a newspaper which does not forewarn persons from taking assignments of bonds, bills, notes, &c.—a practice peculiar to this province, and therefore, most plainly demonstrating that this law made such a change in these assignments, as to put an obligor in a worse situation, in case his bond was assigned, than while it continued in the hands of the obligee. That the practice of declaring in this province on promissory notes, under the statute, may, with more propriety, be resolved into the convenience and ease of the lawyers, than flowing from any principle of law. That the defalcation act is expressly confined to persons having dealings together; and as a *scire facias* is admitted not to a lie, it must be a new construction of statutes, which makes a person a subject of a statute in one part, and not in another—that he may be prejudiced under the law, but can receive no benefit from it. The plaintiff's counsel closed with a case from Lancaster, determined by Messieurs *Lawrence* and *Willing*. It was that of *Bausman*, assignee of *Henry Bough*, assignee of *Jacob Stily*, assignee of *Henry Waggoner*. The action was brought on a note of hand for one hundred and four pounds: plea, payment. Defendant offered to show in evidence an agreement, signed by Waggoner, the original promisee, made at the time the note was given, tending to show a want of consideration: plaintiff objected. The court held it could not be offered, as it would effectually destroy the negotiability of notes; and said, it would be attended with the most dangerous consequences, if the claim of an honest assignee of a bond or note should be defeated by any bargains or agreements, made at the giving such notes or bonds, and not expressed therein. The evidence was accordingly overruled.

The court took time, till the 25th April, to consider, and this day gave judgment.

*27] *Chew, Chief Justice.—The question in this case is, whether Hughes can have the same defalcation against Wheeler, which he could have had against Baynton, if this bond had not been assigned?

It was contended for the plaintiff, that bonds were negotiable, as inland bills of exchange. It was also contended, that defalcation, by the act, is only where there are dealings between the parties. For the defendant, it was contended, that the act does not make them negotiable, as bills and notes are by the statute of 3 & 4 *Ann.*, c. 9.

It is plain, however, that the act was drawn from the statute, for in many places it follows it, *totidem verbis*, though in others it varies. This shows the legislature intended, in those instances, to vary the law. Bills, in England, were negotiable, before the statute; notes were only evidence of a debt; the statute was made to put them on the same footing with bills.

The question is, whether the act of assembly has done the same as the statute? He then compared the act with the statute, to show that it was drawn from the statute.

The act however says, "for the encouragement of trade, commerce, and credit;" the statute adds, "and to make notes negotiable in the same manner as bills." This is a material variance, and is carried through the act. The defendant relied on the words in the act, entitling the assignee to recover the money that should appear to be due, in like manner as the obli-

gee could. Here is the same variance as before; for, by the statute, the assignee is to recover what shall be due, "in like manner as indorsee of a bill of exchange." Had the act pursued the statute in these respects, or expressed the same meaning in other words, the plaintiff would be right.

"What shall appear to be due at the time of the assignment," has been differently applied by the opposite counsel: The plaintiff's counsel contended, that it meant what appeared to be due on the bond; so that, if the bond should be paid, yet if payment was not indorsed, the assignee might recover the whole. The defendant contended, that the clause related only to the manner of proceeding, enabling the assignee to sue in his own name. We have considered this matter very deliberately, and are clearly of opinion, that the variance between the act and the statute, was intentional, not accidental. An argument of force with us, not mentioned by the defendant, arises from the wording of the act. The words "so much as shall appear to be due," relate to the time of trial, and not to the time of the assignment; they are in the future tense.

*It has been said, that it is the obligor's fault not to have the payment indorsed on the bond; but it is not in his power, for the money must be paid before he is entitled to a receipt; and then, if the obligee is a bad man, he may refuse to indorse it. [*28

We are, therefore, clearly of opinion, that an assignee takes the bond at his own peril; and that he stands in the same place as the obligee, so as to let in every defalcation which the obligor had against the obligee, at the time of the assignment, or notice of the assignment.(*a*) The only intent of the act being to enable the assignee to sue in his own name, and preventing the obligee from releasing after assignment.

Judgment for the defendant.

Township of Fallowfield *v.* Township of Marlborough.

Poor.—Order of removal.

It is not necessary that it should appear on the face of an order of removal, that there was an examination of the pauper, or of any other person.

On *certiorari* to Chester, to remove an order and judgment of sessions, for the removal of James Heany.

(*a*) The rule laid down in this case by C. J. Chew has been recognised or adopted in all the subsequent decisions upon the subject, from Inglis *v.* Inglis (2 Dall. 45) down to McMullen *v.* Wenner (16 S. & R. 20). But it was said by Judge Gibson, in Davis *v.* Barr (9 S. & R. 141), not to have been carried farther, than to put the assignee in the place of the obligee as to *defalcation* and want of *consideration*. Therefore, it was held, that an assignee was not bound by an agreement, separate from the bond, but made on the same day, of which he was ignorant, by which the obligee bound himself "not to enter up judgment, nor get it done by anybody else," 9 S. & R. 137. But a payment made by the obligor to the obligee, before *notice* of the assignment, is good against the assignee. Bury *v.* Hartman, 4 S. & R. 175; Brindle *v.* McIlvaine, 9 Id. 74. A promise by the obligor to the assignee, however, made *before* the assignment, binds him, and he will not be permitted afterwards to set up any defence, arising between him and the obligee. Carnes *v.* Field, 2 Yeates 541; Ludwick *v.* Croll, Id. 464; Weaver *v.* McCorkle, 14 S. & R. 304. And see Cook *v.* Ambrose, Addis. 323; Solomon *v.* Kimmel, 5 Binn. 232; Buchanan *v.* Taylor, Addis. 155; Rundle *v.* Etwein, 2 Yeates 23.

Keppele v. Williams.

Exceptions taken to the proceedings below: That it did not appear the pauper had been examined; nor was any reason set forth, why he was not: That natural justice required he should be heard, before he was removed. And the following cases were cited: 2 Salk. 488, to show the examination must be by two justices. 2 Str. 1092. s. p. And. 238; Sett. Cas. c. 18.

But it was answered: 1st. That it was not necessary that the examination should appear on the face of the order. Justices are not obliged to set forth evidence, or every little circumstance; that when nothing is set forth which appears to be wrong, the court will make an intendment in favor of their order. An order to a common intent good. 1 Str. 211. That it is not necessary to set forth the summons and examination of the party. Comb. 474; 1 Str. 630, 211; 2 Ld. Raym. 1406.

2d. That even if it was necessary, there are words in the order equivalent, viz., *on due consideration*, which implies due examination. 3 Burr. Set. Cas. Also the words *due proof*. Also, the words on the examination of Samuel Heany "*as otherwise.*"

That in the cases from Salkeld, there appeared a defect of examination on the order, it having been taken by one justice instead of two.

By the Court.—No case can be shown, where an order was deemed bad, because the examination did not appear on the face of the order. Comb. 474, is a book of no great authority, and this case is contradicted by many others. We are of opinion, that it is not necessary that an examination should appear on the face of the order; nor is it necessary that the examination of any person should be set forth. If any pauper was injured by a removal, *29] the remedy might be *had here, on information; and though it will not restore him, yet he might have complained to the sessions, where everything was open.

The order of sessions confirmed with costs. (*a*)

Keppele *v.* Williams.

Practice.—Continuance.

It is a contempt, to pocket the *venire.*

A Venire had issued, and the jury was summoned: the plaintiff forbade the sheriff to bring the jury to the court. On the day of trial, the plaintiff's attorney demanded the *venire.* Defendant's attorney opposed it, and advised the sheriff to deliver it into court. The jury also attended, upon the application of defendant's attorney. The court was then moved for their direction.

They took the *venire* and called for the panel. The Chief Justice quoting the following authorities, to show that it would be a contempt to pocket the *venire:* Comb. 303; (4 Mod. 367) *Jones* v. *Earl of Bath;* Vin. Abr., tit. Trial, 329.

The plaintiff then moved to continue the cause, which was allowed, defendant having no proviso rule. Defendant then moved for a proviso rule,

---

(*a*) See 1 Yeates 366; 2 Dall. 213; 1 Yeates 250; 5 Binn. 81; 1 S. & R. 387.

to which plaintiff objected, and made affidavit of the absence of a material witness, and service of a *subpœna*, on which the motion dropped.

HERE terminate all the decisions, previously to the Revolution, which I have been able to collect. For the cases, from the *first* page to the close of the *seventeenth*, I am indebted to the Hon. EDWARD SHIPPEN, Esquire; who obligingly permitted me to publish them from his manuscript, in the possession of Mr. Burd. The rest of the cases, through the kindness of the Attorney-General, I have had an opportunity of extracting from the note-book of the deceased Joseph Reed, Esquire, formerly President of this state.

REPORTS OF CASES

SINCE

THE REVOLUTION.

On the organization of the Courts of Justice under the Constitution established by the General Convention, elected for that purpose, and held at Philadelphia, July 15th, 1776, and continued by adjournments to September 28th, 1776, the following appointments took place :

The Hon. Thomas McKean, Esquire, LL.D., was appointed Chief Justice of the Supreme Court, on the 28th day of July 1777.

The Hon. William Augustus Atlee, Esquire, was appointed a Judge of the Supreme Court, on the 15th day of August 1777.

The Hon. John Evans, Esquire, was appointed a Judge of the Supreme Court, on the 15th day of August 1777.

Jonathan Dickinson Sergeant, Esquire, was appointed Attorney-General on the 28th day of July 1777.

Edward Burd, Esquire, was appointed Prothonotary of the Supreme Court, on the 12th day of August 1778.

COURT OF OYER AND TERMINER, AT PHILADELPHIA.

SEPTEMBER SESSIONS, 1778.

Before McKean, Chief Justice, Atlee and Evans, Justices.

Respublica *v.* Molder *et al.*

Trials for treason.

After full argument by *Wilson*, *Ross* and *Lewis*, counsel for Joshua Molder and John Taylor, indicted for treason, and by the *Attorney-General* and *Reed*, in behalf of this Commonwealth—

Respublica v. Malin.

It is ruled, BY THE COURT, That every person accused, or indicted of *high treason*, shall have a copy of the whole indictment (but not the names of the witnesses), a reasonable time, not less than one day before the trial; his attorney, counsel or agent requiring the same, and paying reasonable fees therefor; and shall also be furnished with a copy of the panel of the jurors who are to try him, duly returned by the sheriff, and delivered to him, or his counsel, a reasonable time, not less than one day, before his trial.(*a*)

RESPUBLICA *v.* MALIN.

Treason.

Where the defendant had joined a corps of *American* troops, supposing them to be *British*, it was *held*, that evidence of words spoken by him to prove this mistake, and to show his real intention of joining and adhering to the enemy, was not admissible.

Evidence may be given of an *overt* act committed in another county, after an *overt* act is proved to have been committed in the county where the indictment is laid and tried.

INDICTMENT for High Treason.—The prisoner, mistaking a corps of *American* troops for *British*, went over to them. And now the Attorney-General offered evidence of words spoken by the defendant, to prove this mistake, and his real intention of joining and adhering to the enemy.

This was opposed by the counsel for the *defendant*, who contended that,

*34] as words did not amount to treason, no general evidence *could be given of a man's sentiments; but that the intention expressed by any words offered in evidence, must relate immediately to the *overt* act laid and proved on the indictment; that althought an adherence to the *British* troops was treason, yet, an adherence to *American* troops, even under a supposition that they were *British*, did not amount to that crime; and that the opinion, that words joined with actions made treason, however ingeniously supported, failed in point of law. See 1 Cro. Car. 332.

The *Attorney-General*, on the other hand, admitted that words alone do not amount to treason; but, he insisted that they were proper evidence to explain the defendant's actions on a trial for that crime. 1 Hawk. P. C. 39; Fost. 202. For, though barely being within the enemy's camp might be innocent, yet, if it could be shown that the intention of going thither was to join and adhere to them, the evidence ought to be received.

BY THE COURT.—No evidence of words, relative to the mistake of the *American* troops, can be admitted; for any adherence to them, though contrary to the design of the party, cannot possibly come within the idea of treason. But, as it appears that the prisoner was actually with the enemy, at another time, words indicating his intention to join them are proper testimony, to explain the motives upon which that intention was afterwards carried into effect.

The *Attorney-General* then called a witness to prove that the defendant was seen parading with the enemy's light horse in the city of Philadelphia. But to this, also, his counsel objected; for, they urged, that every criminal

---

(*a*) See United States v. The Insurgents, 2 Dall. 335; United States v. Stewart, Id 342.

act must be tried in the county in which it is committed. Cro. Car. 247; 4 Bl. Com. 301; 3 Inst. 48, 49, 80. And that the circumstance of merely joining the enemy's army, being neither treason, nor misprision of treason, unless done with a traitorous intention, no *overt* act had been proved in Chester, which was a pre-requisite to any evidence being heard of an *overt* act committed in any other county. To evince that this was, likewise, the sense of the legislature, the defendant's counsel read the act of assembly giving the supreme court a special power to try offenders in Lancaster, for crimes committed in the counties of Chester and Philadelphia.

The *Attorney-General* answered, that when an *overt* act is proved in the county where the trial is held, corroborative evidence may be given of *overt* acts committed in any other county. Fost. 9; 2 Hawk. 436. And that having established the prisoner's presence with the British army, nothing, but the proof of actual force, and its continuance, could excuse him from the charge of adhering to the enemies of the commonwealth. Fost. 11. For, joining the army of an enemy, has always been held *prima facie* evidence of an *overt* act. And—

*By the Court, it was accordingly ruled, that evidence might be given of an *overt* act, committed in another county, after an *overt* act was proved to have been committed in the county where the indictment was laid and tried. (*a*) [*35

The defendant was acquitted.

The *Attorney-General* and *Reed*, for the commonwealth.
Wilson and *Ross*, for the defendant.

Respublica v. Abraham Carlisle.

Indictment for treason.

Indictment for treason: The *overt* act laid was taking a commission from the enemy: evidence was admitted to show that the defendant had a power of granting passes into, and out of, the city, then in possession of the enemy.

It is sufficient, in such indictment, to lay, that the defendant sent intelligence to the enemy, without setting forth the particular letter or its contents.

This was an indictment for High Treason, which was set forth in the following words:

"The jurors for the commonwealth of Pennsylvania, upon their oaths and affirmations, do present, that Abraham Carlisle, late of the city of Philadelphia, in the county of Philadelphia, carpenter, being an inhabitant of, and belonging to, and residing within, the state of Pennsylvania, and under the protection of its laws, and owing allegiance to the same state, as a false traitor against the same, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, the fidelity which to the same state he owed wholly withdrawing, and with all his might intending the peace and tranquillity of this commonwealth of Pennsylvania to disturb, and war and rebellion against the same to raise and move, and the

---

(*a*) See the next case and Respublica *v.* Roberts, *post*, p. 39.

government and independency thereof, as by law established, to subvert, and to raise again and restore the government and tyranny of the king of Great Britain within the same commonwealth: On the first day of January, in the year of our Lord one thousand seven hundred and seventy-eight, and at divers days and times, as well before as after, at the city of Philadelphia, in the county aforesaid, with force and arms, did falsely and traitorously take a commission or commissions from the king of Great Britain, and then and there, with force and arms did falsely and traitorously also take a commission or commissions from Gen. Sir William Howe, then and there acting under the said king of Great Britain, and under the authority of the same king, to wit, a commission to watch over and guard the gates of the city of Philadelphia, by the said Sir William Howe, erected and set up for the purpose of keeping and maintaining the possession of the said city, and of shutting and excluding the faithful and liege inhabitants and subjects of this state and of the United States from the said city: And then and there also maliciously and traitorously, with a great multitude of traitors and rebels, against the said commonwealth (whose names are yet unknown to the jurors), being armed and arrayed in a hostile manner, with force and arms did falsely and traitorously, assemble and join himself against this commonwealth, and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner,
*36] array and *dispose himself against this commonwealth; and then and there, in pursuance and execution of such his wicked and traitorous intentions and purposes aforesaid, did falsely and traitorously prepare, order, wage and levy a public and cruel war against this commonwealth; then and there committing and prepetrating a miserable and cruel slaughter of and amongst the faithful and liege inhabitants thereof; and then and there did, with force and arms, falsely and traitorously aid and assist the king of Great Britain, being an enemy at open war against this state, by joining his armies, to wit, his army under the command of Gen. Sir William Howe, then actually invading this state; and then and there maliciously and traitorously (with divers other traitors to the jurors aforesaid unknown), with force and arms, did combine, plot and conspire to betray this state, and the United States of America, into the hands and power of the king of Great Britian, being a foreign enemy to this state, and to the United States of America, at open war against the same; and then and there did, with force and arms, maliciously and traitorously give and send intelligence to the same enemies for that purpose, against the duty of his allegiance, against the form of the act of assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania."

The *Attorney-General* offering a witness to prove, that the defendant had taken a quantity of salt from persons whom he termed *rebels*, as they were passing out of the city of Philadelphia; and that he had a power of granting passes; his counsel objected, that this was impertinent to the *overt* act laid in the indictment, and therefore not admissible. 2 Wils. 148-9. It was urged, that at common law, no evidence could be given of a fact, which was not stated in the declaration. L. N. P. 21, 192-3. And that this caution, with respect to the *allegata et probata*, in a civil cause, ought, *à fortiori*, to be exercised in a capital prosecution. The overt act must be particularly

laid, and strictly proved. 1 Hale H. P. C. 121. For, justice requires that the defendant should be fully apprised of the charge, so that he may have an opportunity of encountering it with his evidence. When, indeed, one *overt* act is established, evidence may be given of another *overt* act, relative to the same treason, but not before. The only *overt* act laid in the present indictment, is taking a commission; and it is no proof of the defendant's taking a commission, that he seized the salt in question, or possessed a power or authority to let people out of the city. Merely to say, likewise, that he was aiding and assisting the enemy, without laying something more, is no offence; to ascertain the crime, it must be *by* joining the armies of the enemy; *by* furnishing them with provisions; *by* enlisting, *or* procuring others to enlist in their troops, or *by* carrying on a traitorous correspondence with them. The aiding and assisting is the *treason*, but these are the *overt* acts, which must be laid and proved, in order to convict the defendant of the charge.

The *Attorney-General*, in reply, observed, that by the pleadings in a civil action, the issue must be reduced to a single point; and he admitted that in all indictments for treason, an *overt* act must be laid* and proved. [*37 But, he contended, that it was unnecessary to fill the indictment with a detail of the whole evidence in support of the prosecution; for if the charge is reduced to a reasonable certainty, it is all that justice can require, and it is all that is to be found in any former precedent. Divers *overt* acts may, also, be laid in the same indictment; and, though some of them are faulty, if one be well proved, it is sufficient to entitle the commonwealth to a verdict. Where a person was charged with compassing the king's death, evidence was allowed to be given of the prisoner's assembling with forty men, though that *overt* act was not laid in the indictment. Fost. 245; Id. 9, 10, 22. As to what amounts to levying war, it is said, Id. 216, that the joining with rebels in an act of rebellion, or with enemies in an act of hostility, will make a man a traitor. So, likewise, shutting gates against the king or his troops, *in confederacy with enemies*, or rebels, comes within the same description of treason. Id. 218. And the same *overt* act may be applied to several distinct branches of treason, Id. 196, 7, 8, where, it appears that Lord Preston's taking boat at Surrey stairs, with the intention of carrying treasonable papers into France, for treasonable purposes, was a sufficient *overt* act in Middlesex, to maintain the indictment there. Id. 217, 218. The form of the present indictment is similar to that against Eneas McDonald. Id. 5. The charge of levying war is made in the same manner, as in the proceedings against the rebels in the year 1746. And the arraying and marching are also laid agreeable to the terms of all the precedents.

The Chief Justice delivered the opinion of the court to the following effect:

McKean, Chief Justice.—There are three species of treason in Pennsylvania;(*a*) First. To take a commission or commissions from the king of Great

(*a*) An act of assembly, passed the 3d December 1782, has increased the number of treasons, by declaring that "erecting or endeavoring to erect a new and independent government, within this commonwealth"—and also "setting up any notice, written or printed, calling the people together for that purpose," are acts of high treason. See 2 Sm. L. 61. And see 1 Id. 435; 2 Id. 531; 3 Id. 186.

Britain, or any under his authority: 2. To levy war against the state or government thereof: and 3. Knowingly and willingly to aid and assist any enemies at open war against this state, or the United States of America. With respect to this third species of treason, the legislature has further explained the meaning of the words, *aiding and assisting*, to be, "by joining the armies of the enemy, or by enlisting, or procuring or persuading others to enlist, for that purpose; or by furnishing such enemies with arms or ammunition, provision or any other article or articles for their aid or comfort, or by carrying on a traitorous correspondence with them." All these several species of treason are laid in this indictment.

*38] *It is here particularly stated, that the defendant took a commission under the king of Great Britain, to watch and guard the gates of the city of Philadelphia; and the offence is certain enough in this description, though, without some *overt* act, it would not be sufficient for a conviction. In order to prove an *overt* act, however, evidence has been offered to show that the prisoner had a power of granting passes into and out of the city, which was at that time in the possession of the enemy. In Fost. 10 (*Berwick's Case*), a witness deposed, that one Berwick was confined in the room assigned for the rebel officers taken at Carlisle by the duke of Cumberland, and this was deemed a sufficient proof of his holding a commission. The court, on the present occasion, however, are of opinion, that the evidence which is offered, ought to be received, but not as conclusive proof of the defendant's having taken a commission. Nor will the evidence of seizing the salt, or any act of disarming the inhabitants whom the defendant called *rebels*, apply to *this* species of treason; however they may support the allegation, of his having joined the armies of the king of Great Britain.

We think it is sufficient, also, to lay in the indictment, that the defendant sent intelligence to the enemy, without setting forth the particular letter, or its contents; and, though the charge of levying war is not, of itself, sufficient; yet assembling, joining and arraying himself with the forces of the enemy, is a sufficient *overt* act of levying war.

By the Court.—Let the witness be sworn.

The *Attorney-General* and *Reed*, for the Commonwealth. *Ross* and *Wilson*, for the defendant.

The defendant being convicted by the verdict of the jury, his counsel filed the following reasons in arrest of judgment:

1. For that the indictment is vague and uncertain, there being no *overt* act expressly or particularly ascertained, as the prisoner is advised it ought to be.

2. For that the formal part of the indictment is not drawn with sufficient precision.

3. For that the several facts are so uncertainly charged, that the prisoner could not be apprised of the particulars urged against him.

4. That the whole wants form and substance.

These reasons were elaborately discussed on the 5th of October 1778, by the same counsel on both sides. But, upon mature consideration, they were finally overruled by the Court, who gave judgment for the Commonwealth; and the defendant, a short time afterwards, was accordingly executed.

*Respublica *v.* John Roberts.

Evidence in treason.

Under the act of 1777, there must be an actual enlistment of the person *persuaded*, to constitute the offence of treason.

Although the defendant's confession, proved by two witnesses, is not sufficient to convict him, substantively, yet, where an overt act is proved, the confession may be given in evidence to substantiate it, although of another species of treason.

Indictment for High Treason.—A witness was called to prove, that the defendant had attempted to prevail upon him to enlist with the British army; but that he did not succeed. This gave rise to a question on these words of the act of assembly: "That if any person or persons knowingly and willingly shall aid or assist any enemies at open war with this state, &c., by *persuading* others to enlist for that purpose, &c., he shall be adjudged guilty of high treason." (1 Sm. L. 435.)

In support of the prosecution, it was urged, that the attempt to prevail constituted the crime; and that it was like the case of a man's sending intelligence to the enemy, which was an act equally criminal in the sender, whether the intelligence was received, or not.

For the defendant, it was argued, that *persuading* implies *success*;—*suadeo* signifying to advise, and *persuadeo* to advise through, or successfully: and therefore, it cannot properly be said of any person, that he was *persuaded*, unless he has done some act in consequence of his persuasion.

By the Court.—There is proof of an *overt* act, that the prisoner did *enlist*, and evidence is now offered to show, that he also endeavored to *persuade* others to enlist, in the armies of the enemy. But we are of opinion, that the word *persuading*, used by the legislature, means to *succeed*; and that there must be an actual enlistment of the person *persuaded*, in order to bring the defendant within the intention of the clause. 2 Lord Raym. 889.

The evidence offered, however, is proper to show *quo animo* the prisoner himself joined the British forces.

The counsel for the commonwealth then offered to give in evidence, the confession of the defendant, that he was going to the Head of Elk, in order to communicate some information to Mr. Galloway, who had, at that time, gone over to the enemy.

But it was opposed by the adverse counsel, who contended, that a confession, unless in open court, had never been evidence to convict. That though under the 1 *Edw. VI.*, it is said, a man might be convicted of treason, by the testimony of two witnesses, or his voluntary confession; 2 Hawk. 256; yet, that statute does not extend to Pennsylvania, and by the 7 *Wm. III.*, *c.* 3, it is expressly declared, that no man can be indicted, arraigned, or tried, in a case of treason, but by the testimony of two witnesses, or the confession of the party made, without violence, in open court. Fost. 10, 241–3. But the act of assembly of Pennsylvania totally excludes a conviction by confession. See Prin. Penal Law, 149. A confession may, indeed, be given in evidence to corroborate a treason that has al-

ready been established by two witnesses; but not to prove the treason itself.

*40] *By the Court.—To prove the defendant's confession by two witnesses, is certainly not sufficient, under the statute, to convict him. But a confession after the fact, is a proof of the *fact itself;* and though not competent alone to supply the want of two witnesses, yet it is good by way of corroboration: and therefore, if an *overt* act has been proved in the county of Chester, by two witnesses, the evidence now offered will be proper, in confirmation of their testimony.

One of the *overt* acts, then, laid in the indictment, is aiding and assisting the enemy, by joining their armies, and this has been legally and satisfactorily proved. Notwithstanding, therefore, the other *overt* act of giving intelligence to the enemy, is not supported by any evidence, but the defendant's own confession now offered, and which is in that respect insufficient; yet, it may be produced to substantiate another species of treason and on that ground we now admit it to be proved. See Foster 10, 244; 5 Bacon's Abr. 145; *Gregg's Case* (Fost. 217); 2 Hawk. 442.(*a*)

The *Attorney-General*, *Sergeant* and *Reed*, for the commonwealth. *Ross* and *Wilson*, for the defendant.

The prisoner being convicted by the jury, his counsel moved the court to set aside the verdict, and grant a new trial, because he was advised, "that the evidence given respecting his declarations, or confessions, was altogether illegal, and ought not to have been allowed."

After argument, by the same counsel, on both sides, the motion was refused by the Court, who gave judgment for the commonwealth; and the defendant, a short time afterwards, was accordingly executed.

(*a*) See Respublica v. McCarty, 2 Dall. 86; United States v. Mitchell, Id. 348.

SUPREME COURT OF PENNSYLVANIA.

APRIL TERM, 1779.

RESPUBLICA *v.* CORNELIUS SWEERS.

Indictment for fraud.

The *United States* became a body corporate from the period of their association.
An indictment may be maintained for a cheat of such a nature as may prejudice, although it does not charge that any person was actually defrauded.

AT a court of Oyer and Terminer, &c., held at Philadelphia, in November 1778, the defendant was indicted for forgery upon two bills. The proceedings were removed by *certiorari*, returnable into this court, on the 5th day of December following; and the issues, on *not guilty* pleaded, were tried before a special jury, on the 14th April 1779, when the defendant was convicted upon both indictments. Afterwards, he filed reasons in arrest of judgment, of which a recapitulation will be found in the sentence of the court; and these reasons were argued, and overruled, on the 19th day of the same month.

The first indictment was for *altering* a bill of parcels and receipt given by Margaret Duncan, for goods bought from her, with intent to defraud the United States; and the charge was set forth in the following words:

"Philadelphia county, ss.

"The jurors for the commonwealth of Pennsylvania, upon their oaths and affirmations, do present, that Cornelius Sweers, late of the county aforesaid, yeoman, on the 4th day of February, in the year of our Lord 1778, and long before, and since, was a deputy commissary-general of military stores, in the armies of the United States of America, and entrusted and employed by Colonel Benjamin Flowers, the commissary-general of military stores in the armies aforesaid, and by the honorable Continental Congress, to make purchases of military stores, and of divers other articles, necessary and fitting in the preparation of military stores, for the use of the armies aforesaid, and to make payments, and take receipts, bills of parcels, and other vouchers therefor. And the jurors aforesaid, upon their oaths and affirmations aforesaid, do say, and further present, that the said Cornelius Sweers, *on the the same 4th day of February, in the year aforesaid, at the city of Philadelphia, in the county aforesaid, having in his custody and possession a certain bill of parcels or account, with a certificate and receipt, all in writing, for a parcel or quan- [*42

tity of flannel cloth, by him purchased of one Margaret Duncan, for the use of the Laboratory of the same armies, and which said writing was in the words, figures, ciphers and letters following; that is to say;

United States of America,

To Margaret Duncan, Dr.

1778, *Feb.* 4th,	To 57 & a qr. yds. flannel,		32*s.* 6*d.*	£	83 5	7
	To 9 yds.	do.	35*s.*		15 15	0
	To 107 & 3 qr. yds.	do.	52*s.* 6*d.*		282 16	10
					381 17	5

I do certify that the above was purchased and delivered to me, for the use of the Laboratory at Carlisle.

ISAAC CORAN, Captain of the Artillery.

And on the back side of which said writing is indorsed and written the words following: 'Received the within contents in full, Margaret Duncan:' He the said Cornelius Sweers, afterwards, to wit, on the same day and year aforesaid, at Philadelphia aforesaid, in the county aforesaid, with force and arms, the said bill of parcels or writing, falsely, fraudulently and deceitfully, did alter, and cause to be altered, by falsely making, forging and adding the figure 4 to and before the figure 9, in the second item of the said bill of parcels or writing, which figures and letters did, before such last-mentioned forgery, import and signify nine yards, but by reason and means of such last-mentioned forgery and addition, did become, import and signify forty-nine yards; and also by forging and altering the figure 1, in the sum of the said second item in the bill of parcels or writing aforesaid, to the figure 8; which figures did, before such mentioned alteration and forgery, import and signify fifteen pounds and fifteen shillings, but, by reason and means of such last-mentioned alteration and forgery, did become, import and signify eighty-five pounds and fifteen shillings; and also by falsely forging and altering the figure 3 to the figure 4, and the figure 8 to the figure 5, in the sum total or amount of the said bill of parcels or writing; which figures did, before such last-mentioned forgery and alteration, import and signify three hundred and eighty-one pounds, seventeen shillings and five pence, but, by reason and means of such last-mentioned forgery and alteration, did become, import and signify four hundred and fifty-one pounds, seventeen shillings and five pence, with intention to defraud the United States of America aforesaid, of seventy pounds of lawful money of Pennsylvania; to the evil example of all others in like case offending, to the great damage of the said United States, and against the peace and dignity of the commonwealth of Pennsylvania."

*43] *The second indictment was for *forging* a receipt, purporting to be a receipt from one Adam Foulk, with intent to defraud the United States. It was expressed in the following words:

"*Philadelphia* county, ss.

"The jurors for the commonwealth of Pennsylvania, upon their oaths and affirmations, do present, that Cornelius Sweers, late of the county aforesaid, yeoman, on the first day of July, in the year of our Lord one thousand seven hundred and seventy-seven, and long before and since, was a clerk to the department of the commissary-general of military stores, in the armies of

the United States of America, and entrusted and employed by Colonel Benjamin Flowers, the commissary-general of military stores in the armies aforesaid, and by the honorable Continental Congress, to make payments and take receipts, bills of parcels, and other vouchers for military stores, and for divers articles, necessary and fitting in the preparation of military stores, purchased for the use of the armies aforesaid, and to keep the accounts thereof: And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the same Cornelius Sweers, on the same day and year aforesaid, at the city of Philadelphia, in the county aforesaid, contriving and intending falsely and fraudulently, to deceive and defraud the United States aforesaid, with force and arms, falsely, wickedly and unlawfully, did make, forge and counterfeit, and cause to be made, forged and counterfeited, a certain writing, purporting to be a receipt for one thousand and twenty pounds and fifteen shillings, and purporting to be signed in the name of one Adam Foulk, in the words and figures following, to wit, '3 Rec'd, 1st July 1777, of Col. B. Flower, C. G. M. S., one thousand and twenty pounds 15*s.* for 820 bayonet belts, and 920 cartouch boxes for the use of the army.

£1020 15 ADAM FOULK.'

To the evil example of all others in like case offending, to the great damage of the United States, and against the peace and dignity of the commonwealth of Pennsylvania.

And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said Cornelius Sweers, contriving and intending the said United States, falsely and fraudulently, to deceive and defraud, then and there, with force and arms, the said writing, so as aforesaid falsely made and counterfeited, purporting to be a receipt for the sum of one thousand and twenty pounds and fifteen shillings, and purporting to be signed in the name of the said Adam Foulk, wickedly, unlawfully and fraudulently, did publish, and cause to be published, as and for a true writing and receipt of the said Adam Foulk; which said falsely forged and counterfeited *writing is in the words and figures following, to wit: '3 Rec'd, 1st July 1777, of Col. B. Flower, C. G. M. S. one thousand and twenty pounds 15*s.* for 820 bayonet belts and 920 cartouch boxes for the use of the army. [*44

£1020 15 ADAM FOULK.'

(He the said Cornelius Sweers, at the time of publishing the said false and counterfeit writing there, by him, in form aforesaid, well knowing the said writing to have been falsely forged and counterfeited as aforesaid); to the evil example of all others in like case offending, to the great damage of the said United States, and against the peace and dignity of the commonwealth of Pennsylvania."

The prisoner being brought before the court to receive sentence, MCKEAN, Chief Justice, addressed him to the following effect:

Cornelius Sweers:—After a fair and full trial, you have been convicted of the crime of *forgery*, upon two indictments, by a special jury of your country. The offence stated in the first indictment, is that of altering a receipt given by Margaret Duncan; and the charge contained in the second indictment, is that of forging a receipt, purporting to be the receipt of Adam

Foulk. Your counsel have taken several exceptions to the form and substance of these indictments, upon a motion in arrest of judgment.

The first exception was, "that, at the time of the offence charged, the United States were not a body corporate known in law." But the court are of a different opinion. From the moment of their association, the United States necessarily became a body corporate; for, there was no superior from whom that character could otherwise be derived. In England, the king, lords and commons, are certainly a body corporate; and yet there never was any charter or statute, by which they were expressly so created. An indictment, however, may be sufficiently maintained upon "an intent to deceive my liege subjects;" and to that purpose there is a positive authority, not referred to by the counsel, where a person was indicted, for having in his custody a piece of base metal, in the similitude of a six-pence, knowing it to be base, with intent to defraud the liege subjects, &c.

The second exception was, "that the charges in the indictments, were not direct and positive, but only argumentative." On this point, we cannot hesitate to declare, that the charges appear to us to be as direct and positive, as it was possible to express them.

The third exception was, "that the indictments do not charge any person was actually defrauded." But in the *King* v. *Webb*, 2 Ld. Raym. 1461, all the judges declared, that if the cheat be prejudicial, that is, of such a nature as may prejudice, an indictment * would well lie. In the case of forgery, properly so called, which includes only records, deeds, wills, or public instruments, it may, perhaps, be necessary that some person should be actually prejudiced. This rule, however, does not extend to cheats of the present description; in which it is sufficient, that the act be of a prejudicial nature.[1]

*45]

Upon the whole, we are of the opinion, that your conviction has been legal, as well as just; and, therefore, it only remains to pronounce the sentence of the court.

Sentence, on the first indictment: A fine of 70*l.* and imprisonment until the 4th of July, the anniversary of American Independence.

Sentence, on the second indictment: A fine of 1020*l.* and imprisonment until the next annual election for Pennsylvania, and standing in the pillory for one hour.(*a*)

The following appointments took place in the course of *April* and *September* Terms 1780.

The Hon. George Bryan, Esquire, was appointed a Judge of the Supreme Court, on the 3d day April 1780.

Jonathan Dickinson Sergeant, Esquire, having resigned the office of Attorney-General on the 20th day of November 1780, *William Bradford*, junior, Esquire, was appointed Attorney-General on the 23d day of November 1780.

(*a*) See Respublica *v.* Teischer, *post*, 335; 2 Dall. 299, in note; 3 Id. 54. And see Respublica *v.* Powell, *post*, 47; Commonwealth *v.* Wade, stated *post*, 337, in note; Com. *v.* Eckert, 2 Bro. 251; Pennsylvania *v.* McKee, Addison 33.

[1] See McClure *v.* Commonwealth, 86 Penn St. 353.

*APRIL TERM, 1780.

RESPUBLICA *v.* POWELL.

Cheating by false tokens.

It is an indictable offence in a public officer, to impose false marks on stores provided for the army of the United States, whereby the public is injured.

THIS was an indictment against the defendant, a baker employed by the army of the United States, for a cheat, in baking 219 barrels of bread, and marking them as weighing 88 lbs. each, whereas, they only severally weighed 68 lbs. The indictment being originally found at the City Court, in October sessions, 1779, was removed by *certiorari* into this court.

And now, *Lewis*, for the defendant, contended, that false tokens are only indictable by the stat. of 33 *Hen. VIII.*, c. 1, which has no operation in Pennsylvania; and he cited 3 Burr. 1697; 1 Burn. 291; 2 Sess. Cas. 2.

The *Attorney-General* (*Sergeant*) insisted that the defendant's office was a public trust; and cited 2 Burr. 1125; 1 Hawk. 187.

THE COURT said, that this was clearly an injury to the public; and the fraud the more easily to be perpetrated, since it was the custom to take the barrels of bread at the marked weight, without weighing them again. The public, indeed, could not, by common prudence, prevent the fraud, as the defendant was himself the officer of the public *pro hâc vice*. They were, therefore, of the opinion, that the offence was indictable. (*a*)

JAMES'S CLAIM.

Estate-tail.

Devise to A., "during the term of his natural life, and if he leaves lawful issue, then to such issue; but in case of his dying without issue, or they dying under twenty-one years," then to B. in fee; A. was attainted of treason: *Held*, that he took an *estate-tail*, which was forfeited by the attainder.

THE case was this: John Parrock was attainted of High Treason, and his estate seized and advertised for sale. Abel James filed a claim, according to the act of assembly, passed the 6th day of March 1778 (1 Sm. L. 457), in order to obtain a decree establishing his right, to what, he alleged, was a vested remainder in him, after the expiration of an estate for life, which, he contended, was all that John Parrock was possessed of in the premises, and he never had any issue.

*The question depended on the due construction of the following devise:—"I devise the residue of my estate to John Parrock, during the term of his natural life, and if he leaves lawful issue, then I give my real estate unto such issue; but in case of his dying without issue, or they dying under the age of twenty-one years, then I devise all my real estate unto Abel James, his heirs and assigns, on condition that he or they pay the Pennsylvania Hospital 300*l.*" [*48

(*a*) See the note to Respublica *v.* Sweers, *ante*, p. 45.

James's Claim.

After argument (by *Sergeant*, for the *commonwealth*, and *Lewis*, for the *claimant*), the CHIEF JUSTICE delivered the opinion of the court as follows:

McKEAN, Chief Justice.—The remainder in fee of this estate is claimed by Abel James; who alleges that, whether the estate given to Parrock was for life, or in tail, he is entitled to a vested remainder in fee, which is not barred by the attainder of Parrock. The court, however, are of opinion, that the word "issue" in this case is a limitation, and that John Parrock took an estate-tail, under this devise. Probably, indeed, no more than an estate for life was intended to have been given to him, but the law supervenes that intention. There is a second intention, manifest in the will, which is to be carried into execution; that is, that the issue should take in succession, which they could not do, without a previous estate of inheritance in the father. The meaning of the testator appears clearly to have been, that the estate should not go over, while there was any issue, and it is expressly provided, that all must be extinct, and none have attained the age of twenty-one years, before it should pass to Abel James.

This is not a new case; for, it has been long settled, that the words "natural life" make no difference. *Sunday's* case, 9 Co. 127; *Helin* v. *Jenings*, 1 Freem. 509; *Thrustout* v. *Peak*, 2 Eq. Cas. Abr. 312; *White* v. *Collins*, Comyn 289; 1 Will. 600, 754, &c.; Fortesc. 83; 2 Ld. Raym. 1437; 1 Barnard. in K. B. 6, 367. Such was the decision.

As therefore, John Parrock took an estate-tail, the land was forfeited by the attainder; and the claim of Abel James must be dismissed.(*a*)

The claim dismissed.(*b*)

(*a*) Subsequently to this decision (in May 1791), John Parrock died without issue, and the assignees of Abel James instituted an ejectment against the party holding under the commonwealth, having previously paid 300*l.* to the Pennsylvania Hospital. A case was stated for the opinion of the supreme court, who *held*, that the estate in the commonwealth ceased on the death of John Parrock, and that the remainder to Abel James was *vested* and took effect in possession, on payment of the 300*l.* The case is reported in 1 Yeates 332, by the name of Evans's Lessee *v.* Davis. And see the remarks of C. J. McKEAN upon the foregoing case, in 1 Yeates 338. See also Haines *v.* Witmer, 2 Yeates 400; Willis *v.* Bucher, 3 W. C. C. 369; Burkhart *v.* Bucher, 2 Binn. 455; Carter *v.* M'Michael, 10 S. & R. 429; Kinsey *v.* Lardner, 15 Id. 192.

(*b*) See 2 Doug. 488, n.

HIGH COURT OF ERRORS AND APPEALS OF PENNSYLVANIA.

APRIL SESSIONS, 1780.

MONTGOMERY *v.* HENRY *et al.*

Admiralty.—Powers of ship-owners.

Upon a general retainer of a vessel for no particular voyage, the owner may dismiss the master at any time, without cause assigned; but where a particular voyage is agreed upon, though they may dismiss him, yet they would be liable in damages in a common-law court.
Montgomery v. Wharton, 2 Pet. Ad. 397, affirmed.

THIS case, which was an appeal from a decree in the Admiralty, having been elaborately argued on the 6th of May, the PRESIDENT delivered the opinion of the Court.

REED, President.—The case upon which we are now to give our judgment, comes before us under the following circumstances:—Captain Montgomery was master and commander of the ship, called the General Greene, designed for a voyage to Martinico. While the ship lay in the river, a severe frost happened, which occasioned a great delay, and the owners thought proper to alter their plan. Differences then arose: they dismissed Captain Montgomery, and took the ship from him. Upon this, he preferred his libel in the court of admiralty, complaining of the injury, as done to him in the port of Philadelphia, and within the jurisdiction of the court of admiralty. The answer of the owner to the libel is, that they had a right to remove their captain when they pleased, and that they are willing to pay him any damages he may have received by the removal.

Two general questions arise: 1. Is the matter complained of within the admiralty jurisdiction? 2. On the merits, had the owners a right to remove Capt. Montgomery?

The first question is subdivided into two others. 1. Had the court of admiralty cognisance of this cause, considering the place where the offence is charged to have been done? 2. Is the subject-matter of admiralty cognisance?

All the proceedings are laid to have taken place within the port of Philadelphia. The respondents say, that the river Delaware is not within the admiralty jurisdiction, and to prove this, they cite Ld. Raym. 1453. But, it appears to us, that, from the 12th and 15th *Ric. II.*, the admiralty has had jurisdiction on all waters out of the body of the county. There has been great debate as to what is * meant by high seas. A road, haven, [*50 or even river, not within the body of the county, is high sea, in the idea of civilians. Therefore, if the river Delaware is out of the body of any county,

we think it clear, that it is within the admiralty jurisdiction. And the court would endeavor to enlarge its jurisdiction, rather than a place should remain subject to no control. The place where the fact was done, which is complained of as an injury, is expressly alleged in the libel, to be within the jurisdiction of the admiralty. This is not contradicted in the answer; and we must take up the matter as it stands upon the libel, not on the evidence; because there is no opportunity to traverse. On this point, therefore, we rather incline to say, the jurisdiction is well laid.

But what we found our decree upon, is the other particular, the subject-matter. It has been contended by the counsel for the respondents, that the court of admiralty cannot carry an agreement into specific execution; and, also, that this is never done, even in a court of chancery, for one party, unless they could do it for the other, in case they wished for a specific performance. To this, it has been answered, that otherwise there is no complete remedy.

It was observed, by one of the counsel for the respondents, that it is difficult to know in what light to consider the application in this instance. It appears to us, however, that it can be considered in no other light, than as an application to compel a specific performance of an agreement: And to show that this can be done by a court of admiralty, Vent. 32, was cited; where it appears, that a master of a vessel in Spain had been obliged to take on board his vessel forty butts of wine. But the determination of the admiralty in England seems to be rather out of respect to the foreign court, than from an opinion, that they could do this by virtue of their authority originally; for, it is introduced by saying, that the judgment of a foreign court ought to be supported, even as to what might not be cognisable originally there.

It has been said that the court of admiralty acts *in rem*, that is, only to make the objects of dispute responsible. This, however, is a confidential trust, and we see no instances of any such jurisdiction. Does the master ship himself on the credit of the ship? No; it is no more than a contract. Whether the doctrine of mutuality of remedies be a fixed rule in the court of chancery, I am not altogether certain; but it is reasonable, that the parties should stand on an equal footing. No such remedy could be obtained by the owners against the master. It is said, he might be attached, if he failed of his duty; so might the owners; still the ship would be liable, as against the owners. Indeed, I know of no case where an attachment has issued, unless for some contempt; nor does Carthew contradict this.

If the libel is considered as complaining of a *trespass*, instead of demanding performance of the agreement, I do not see that this will help the appellant; for, an admiralty court cannot give damages.(*a*)

*51] * This seems to be assigning to this court a jurisdiction which it has not. We are, therefore, unanimously of opinion, that, from the object of the libel, it cannot be supported.

As to the other point, the dismissal of the master, we are of opinion, that upon a general retainer, for no particular voyage, the master may

(*a*) But see the case of Talbot *v.* Three Brigs, &c., *post*, p. 95, where DICKENSON, President, said, "It is now settled, that damages *may* be assessed in the admiralty."

be dismissed at any time, without cause assigned; but that where there is a charter-party, bills of landing, and a particular voyage agreed upon, though the owners may dismiss the master, yet they would be liable in a common-law court. Suspicions might probably be sufficient to discharge, without proofs; but, if the dismissal should appear to have been a wanton abuse, the jury would give great damages, otherwise little; or, as the circumstances might be—nothing.(*a*)

We therefore affirm the decree with costs.(*b*)

(*a*) See Respublica v. Lacaze, 2 Dall. 118.

(*b*) The decree of the court of admiralty in this case is reported in the volume of Admiralty Judgments by Judge HOPKINSON, page 24, and in 2 Peters' Admiralty Decisions, p. 397. Upon the subject of admiralty jurisdiction, see Jennings *v.* Carson, 1 Pet. Ad. 8; Gardner *v.* The N. Jersey, Id. 231; Brevoor *v.* The Fair American, Id. 92; Moxon *v.* The Fanny, 2 Id. 325, &c.

SUPREME COURT OF PENNSYLVANIA.

APRIL TERM, 1781.

The Claim of JACOBS *v.* ADAMS, Executor.

Interest.

Interest is not recoverable, where money has been received and paid in a mistake, and neither fraud nor surprise is imputed to either party.

THIS case had been argued, on the 3d of July, by *Lewis*, for the claimant, and *Bradford* for the estate of Adams. The former cited 2 P. Wms. 157, 154; Pract. Reg.; Barn. 151; 3 Wils. 206; 2 Burr. 1083. The latter cited 10 Mod. 277; 6 Id. 167.

And now, the 8th of July, the CHIEF JUSTICE stated the question, and delivered the opinion of the court, to the following effect:

McKEAN, C. J.—The testator, Flowers, and Jacobs, entered into an agreement for the sale of certain lands; soon after which, Flowers died, and Jacobs paid the purchase-money to his executors. The will, however, which appointed these executors, was afterwards set aside, having been obtained by undue influence; and Jacobs filed the present claim to recover the money that he had thus improperly paid.

The only question submitted to the consideration of the court, is, whether, under these circumstances, interest should be allowed?

If there appeared, on the part of the executors, anything like a *suppressio veri*, or *suggestio falsi*, our decision would, perhaps, be different from that which we have formed. But on the present complexion of the transaction, we think no interest ought to be allowed.

In Ventris, it is said, that no interest is lawful, and, in many other cases, that it cannot be recovered, unless given by a positive statute. When the Stat. of *Hen. VII.* was passed, a question arose, whether interest might be allowed, pending a writ of error; and it was refused. In the case of promissory notes, however, where a day certain is fixed for payment, interest is is allowed from the day of payment: and, where no day is fixed, it is payable from the time of demand. But in the instance before us, the money was received as well as paid, in a mistake, and neither fraud or surprise can be imputed to either party. Therefore, let the claim be allowed for the principal sum which Jacobs had paid, without interest.(*a*)

(*a*) This case, stated somewhat differently, is cited in Henry *v.* Risk, *post*, p. 265. And the principle upon which it was decided was adopted in Brown *v.* Campbell, 1 S. & R. 176, and King *v* Diehl, 9 Id. 409. See also Eckert *v.* Wilson, 12 Id. 393.

*Respublica *v.* Samuel Chapman.

Treason.

High treason might have been committed against the commonwealth of Pennsylvania, previous to the meeting of the supreme executive council, in March 1777; but under the act of 28th of January 1777, it seems, that an inhabitant of Pennsylvania had the privilege of choosing his side in the political contest, until the 11th of February 1777.

By a proclamation, dated the 15th June 1778, issued by the Supreme Executive Council, in pursuance of the act of assembly, passed the 6th of March preceding, for the attainder of divers traitors, &c. (1 Sm. L. 449), the prisoner had been required to surrender himself on the 1st of August following, &c., or to be attainted of high treason agreeably to that act. The time allowed for his surrender being elapsed; the attorney-general filed a suggestion, in the usual form, stating that Samuel Chapman the prisoner was the person required by the proclamation to surrender himself, &c.; that he had not surrendered himself, &c.; that he was therefore attainted; and this he was ready to verify, &c. The Chief Justice then asked the prisoner, what he had to say, why execution should not be awarded against him.

Upon which, the said Samuel Chapman, the prisoner, saith, *ore tenus*, that he was born, and hath ever remained and continued a subject of the king of Great Britain, and is now a prisoner of war; and that he is not, nor hath ever been a subject or inhabitant of this commonwealth; nor hath he, nor he never had, any real estate in this commonwealth; neither hath he at any time owed allegiance thereto: Wherefore, he prays that execution may not be awarded against him, &c.

The attorney-general replied, that the said Samuel Chapman, the prisoner, was an inhabitant and subject of this commonwealth, &c., and that he did owe allegiance thereto, &c. Whereupon, issue was joined.

The evidence upon the trial of this issue was, that the prisoner was born in Bucks county, in this state, and that he had resided there until the 26th day of December 1776, at which time, he departed and joined the enemy. Whether, upon these facts he was to be considered as an inhabitant and subject of the commonwealth of Pennsylvania, at the time of his departure, was the great question to be decided.

His counsel argued, that on the 26th December, 1776, there was no government established in Pennsylvania, from which he could receive protection; and, consequently, there was none to which he could owe allegiance—protection and allegiance being political obligations of a reciprocal nature. The doctrine of perpetual allegiance, to be found in the books, applies only to established and settled governments; not to the case of withdrawing from an old goverment, and erecting a distinct one. Then, every member of the community has a right of election, or resort to which he pleases; and even after the new system is formed, he is entitled to express his dissent; and dissenting from a majority, to retire with impunity into another country. Upon this principle, it was asserted, that the prisoner never was a subject of the state of Pennsylvania; and *the following narrative of the measures pursued in organizing the constitution, was delivered in support of the assertion. [*54

The first act of legislation, under the constitution, was passed on the

21st January 1777. On the 28th day of the same month, the laws of the late province, with certain restrictions, were, from and after the 10th day of February then next, to be revived; and on the 4th of March following, the first President and Vice-President were elected; when, also, the first minutes were made on the records of the Supreme Executive Council. So that the prisoner's departure from this state, on the 26th December 1776, was near a month antecedent to any legislative act; and near three months before *all* the branches of the government were organized and put into actual operation. Besides, the act for the revival of the laws, expressly admits that they were not in force from the 14th May 1776, until the 11th February 1777: and the act for declaring what shall be treason, which did not pass until the last-mentioned date, excludes every idea of retrospect; declaring only, "that all persons *now* inhabiting, &c., within the limits of the state of Pennsylvania; or that shall voluntarily come into the same hereafter to inhabit, &c., do owe and shall pay allegiance, &c." The prisoner, at the time of passing this act, was not an inhabitant: nor has he since voluntarily become one. He does not, therefore, owe allegiance to the state, and cannot be denominated a subject of Pennsylvania. With respect to the act of the 6th March 1778, on the authority of which the present proclamation issued, it is evidently an *ex post facto* law, and as such, contrary to the words and spirit of the constitution. But if the prisoner never was a subject of the commonwealth of Pennsylvania, this law cannot operate against him in the decision of the issue before the court.

The counsel for the *prisoner* cited the following authorities in the course of their argument: Puff. 639; Locke on Gov. 229, 168, 227; Vatt. 23, 25, *b.* 3, *p.* 109; Burlemaqui 27, 33; 1 Bl. Com. 45; *Harvey's case*, Foster C. L. 55.

The *Attorney-General* stated the question to be, in fact, whether Pennsylvania was a commonwealth on the 26th day of December 1776? By the Declaration of Independence, on the 4th July 1776, every state in the union was solemnly declared to be free and independent. But even before that period, congress had recommended, that new governments should be framed, adequate to the exigency of the public affairs; and a council of safety, with other temporary bodies, actually discharged the functions of the state. See Journals of Congress 10th and 14th May 1776; 4th of June 1776; 16th June 1776; 24th do. and July 14th.

In consequence of the Declaration of Independence, however, a General Convention assembled at Philadelphia on the 15th July, 1776; and on the 28th of September following, agreed to that social compact under which the people of this state are now united. It appears, that a *quorum* of the legislative body, created by the constitution *thus established, met on the 28th of November 1776, and then chose their speaker and clerk. 1 Min. Ass. 98. On the succeeding day, the clerk was qualified, several public officers were appointed, and votes were entered into respecting the collection of fines from non-associators, and the enacting of a militia-law. Id. On the 30th of November, the house having made sundry orders relative to the *militia*, adjourned until the 1st of December, and on the 5th of that month, when the house were again assembled, a committee was appointed to bring in the draft of a militia-law. Id. 100. With respect to the Executive Council, it is true, that body did not enter upon any official business, until the begin-

55*]

ning of March 1777; but its members were chosen at the same time with the members of the legislature.

From this recapitulation, it appears, that, even before the establishment of the constitution, a government under the authority of the people was administered by councils, committees and conventions. After the establishment of the constitution, however, the legislative (which is the sovereign) body, assembled and proceeded to discharge its duties; and it was not necessary to the existence of the government, either that they should have enacted a law, or that the Supreme Executive Council should have been convened.

Under every change of the government, Samuel Chapman remained here until the 26th day of December 1776; and, at that time, he was certainly a subject of the state of Pennsylvania, under the constitution agreed to on the 28th day of September preceding, whatever doubts may be entertained with respect to the former establishments. That this was, likewise, the sense of the legislature, is abundantly evident from the act on which the proclamation is founded; for Mr. Galloway and others, who joined the enemy in the fall of 1776, are there considered as subjects of Pennsylvania; and all the states are clearly deemed to have been free and independent from the declaration published by congress on the 4th of July in that year.

The Attorney-General, to show the definition of a nation, the relation which a citizen bears to the state, and the natural connection between a state of society and the institution of a government, cited the following authors: Vatt. 92; Id. *B.* 1, *c.* 19, § 212; Id. § 1, *p.* 9; Id. § 4. Burlem. 25; 1 Black. Com. 46, 47, 48, 213; Vatt. *p.* 15, § 26; Id. 19, § 38.

The Chief Justice delivered a learned and circumstantial charge to the jury. After stating the proclamation, the issue, and the evidence, he proceeded as follows:

McKean, Chief Justice.—The question that is to be decided on the facts before us, is, whether Samuel Chapman, the prisoner at the bar, ever was a subject of this commonwealth? The reason which has been principally urged to take him out of that description, is that on the 26th day of December, in the year 1776, when he withdrew from Pennsylvania, no government existed to which he could owe allegiance as a subject. I shall, in the first place, consider how *far this defence, under the circumstances [*56
of the case, would avail the prisoner upon an indictment for high treason.

The Attorney-General has referred to the declaration of Independence, on the 4th of July 1776, when the freedom and sovereignty of the several states were announced to the world; and also, to a resolution of congress recommending the formation of such governments, as were adequate to the exigency of the public affairs. The sister states pursued different modes of complying with this recommendation. The citizens of Connecticut, New Hampshire and Rhode Island, considered themselves in a situation similar to that which occurred in England, on the abdication of James the second; and, wanting only the form of a royal governor, their respective systems of government have still been continued; while the other states adopted temporary expedients, until regular constitutions could be formed, matured and organized.

And here it is contended, that, prior to the constitution under which we now live, the state of Pennsylvania was governed by a council of safety, and committees. But to this, it is answered, that until laws were passed by a competent legislative power, no government could be said to exist; and, as the act of the 28th of January 1779, for the revival of the laws, virtually declares that they were suspended from the 14th May 1776, until the 11th February 1777, it is inferred, that during that period, no allegiance was due, and no treason could be committed.

Although I think this point immaterial to the prisoner, since a government might have existed, and yet not be of such a nature as to affect him, it cannot be denied, that a kind of government, independent of Great Britain, was administered in Pennsylvania, antecedent to the establishment of the present constitution. The powers of sovereignty were then lodged with congress, under whose authority a council of safety had been elected by the people, and were employed, in conjunction with other committees, to conduct the war, and to secure, as far as so imperfect a system could, the rights of life, liberty and property within this state. It is certain, indeed, that a formal compact is not a necessary foundation of government; for, if an individual had assumed the sovereignty, and the people had assented to it, whatever limitations might afterwards have been imposed, still this would have been a legal establishment. No express provision, however, has been at any time made, for defining what should be treason against those temporary bodies; but it may be well enough to observe, that treason is a crime known to the common law.

Afterwards, we find, that a General Convention, elected by the people, met on the 15th day of July 1776, for the express purpose of framing a new government; and during the sessions of this body, its members, collectively, assumed the powers of making ordinances, of appointing members of congress, and of defining high treason, and its punishment. All their proceed-
*57] ings and injunctions, except the ordinance respecting treason, were approved and executed; *and the constitution which they eventually agreed upon, was incontrovertibly a dissolution of the government, as far as related to the powers of Great Britain, but not in relation to the powers which had been before exercised by councils and committees.

The Attorney-General has urged that, at least, as soon as the government under the new constitution was formed, which he says was on the 28th of November 1776, the members of council being then chosen, and the legislature actually assembled, the sovereignty of the state was complete, and allegiance followed, by a necessary consequence, without the intervention of any positive law. But the advocates for the prisoner again object, that the government cannot be said to be established, until there is a meeting of all its parts, and that as the executive council never met until the 4th of March 1777, the state was incapable of affording protection, and therefore, was not entitled to allegiance, before that time.

On this occasion, the sentiments of several eminent *civilians* have been read to us; not as authorities binding upon our judgment, but as a means of information derived from the great learning and abitities of the respective writers, and, principally indeed, on account of the intrinsic weight of the reasons by which their doctrines are supported. Locke says, that when the executive is totally dissolved, there can be no treason; for laws are a mere

nullity, unless there is a power to execute them. But that is not the case at present in agitation; for before the meeting of council in March 1777, all its members were chosen, and the legislature was completely organized: so that there did antecedently exist a power competent to redress grievances, to afford protection, and generally, to execute the laws; and allegiance being naturally due to such a power, we are of opinion, that from the moment it was created, the crime of high treason might have been committed by any person, who was then a subject of the commonwealth. The act of the 11th of February 1777, expressly authorizes this opinion; for, we find it there said, "That all and every person and persons (except prisoners at war) *now* inhabiting, &c., within the limits of this state; or that shall *voluntarily* come into the same *hereafter* to inhabit, &c., *do* owe, and shall pay allegiance, &c." This, therefore, contradicts the idea, suggested by the advocates for the prisoner, that allegiance was not due until the meeting of the executive council, on the 4th of March ensuing; and, although he cannot be convicted upon that act, yet allegiance being due from the 28th of November 1776, when, as I have already observed the legislature was convened, and the members of council were appointed, treason, which is nothing more than a criminal attempt to destroy the existence of the government, might certainly have been committed, before the different qualities of the crime were defined, and its punishment declared by a positive law. 1 Bl. Com. 46.

Having thus dismissed the preliminary question, whether the prisoner's defence would avail him upon an indictment for high treason, *I shall proceed to inquire, if there are any circumstances that take his case out of the general opinion expressed by the court upon that point. [*58

The act for the revival of the laws, passed the 28th of January 1777, was intended, I think, merely to declare, that those laws which were originally enacted under the authority of George the Third, ceased any longer to derive their virtue and validity from that source. But there is great inaccuracy in penning the act; for, though it would seem, by the former part of the second section, to be the sense of the legislature, that from the 14th of May 1776, to the 10th of February 1777, the operation of all the acts of assembly should be suspended; yet, in the close of the same section, obedience to those acts, to the common law, and to so much of the statute law of England, as have *heretofore* been in force in Pennsylvania, is, with some exceptions in point of style and form, expressly enjoined. We may, however, fairly infer from the general tenor of the act, that those who framed it, thought the separation from Great Britain worked a dissolution of all government, and that the force, not only of the acts of assembly, but of the common law and statute law of England, was actually extinguished by that event.

This, therefore, necessarily leads to the consideration of a very important subject. In *civil wars*, every man chooses his party; but generally that side which prevails, arrogates the right of treating those who are vanquished as rebels. The cases which have been produced upon the present controversy, are of an old government being dissolved, and the people assembling in order to form a new one. When such instances occur, the voice of the majority must be conclusive, as to the adoption of the new system; but all the writers agree, that the minority have, individually, an unrestrainable right to remove with their property into another country; that a reasonable time for that purpose ought to be allowed; and, in short, that none are subjects of the

adopted government, who have not freely assented to it. What is a reasonable time for departure may, perhaps, be properly left to the determination of a court and jury. But whether a man should be suffered to join a party, or nation, *at open war* with the country he leaves, is a question of singular magnitude. The ground is hitherto untrodden, but there is such apparent injustice in the thing itself, that I am inclined to think, it would amount to an act of treason. Puffendorf, 639.

This is not, however, the situation of the prisoner. Pennsylvania was not a nation at war with another nation; but a country in a state of *civil war*, and there is no precedent in the books to show what might be done in that case; except, indeed, where a prince has subdued the people who took arms against him, before they had formed a regular government, which is, likewise, inapplicable here.

But this difficulty seems to vanish, by having recourse to the opinion of the legislature, in their act of the 11th February 1777; for, when describing
*59] from whom allegiance is due, they speak only *of persons *then* inhabiting the state, or who should *thereafter* become its inhabitants. Hence, a discrimination is evidently made between those persons, and such as had previously joined the enemy; meaning that this election to adhere to the British government, should not expose the party to any future punishment. It is true, that there are not any negative words to this effect; but, taking the act for the revival of the law also into consideration, we think the design and intention of the legislature sufficiently appears to have been, to allow a choice of his party to every man, until the 11th of February 1777; and that no act savoring of treason, done before that period, should incur the penalties of the law.

This construction, it may be said, is favorable to traitors, and tends to the prejudice of the commonwealth. But we cannot be influenced by observations of a political nature in the exposition of the law; it is our duty to seek for, and to declare, the true intention of the legislature; the policy of that intention, it is their duty to consider. The sentiments which I have now delivered, I always entertained. On the 13th of August 1779, the Executive Council had sixteen or seventeen persons in their power, who, though not attainted, were in circumstances similar to the prisoner's. On that occasion, I was consulted, and gave the same opinion; but with great diffidence, owing to the novelty of the question. Those persons were, accordingly, treated as prisoners of war.

But there is yet another important point to be examined in the case before us. By an act, subsequent to all those which have been mentioned, it is declared, "that all and every person and persons *being subjects or inhabitants of this state*, or those who have real estate in this commonwealth, *who now adhere to*, and knowingly and willingly aid and assist the enemies of this state, or of the United States of America, *by having joined their armies* within this state, or elsewhere, or who hereafter shall do the same, and whom the Supreme Executive Council of this state, by their proclamations, to be issued under the state seal, during the continuance of the war with the king of Great Britain, shall name and require to surrender themselves, by a certain day therein to be mentioned, to some, or one, of the justices of the supreme court, &c., and shall not render themselves accordingly, &c., shall, from and after the day to them to be prefixed by such

proclamation, stand and be attainted of high treason to all intents and purposes, &c." Under the authority of this clause, the prisoner was duly required by proclamation to surrender himself; and therefore, his case seems to come properly within the act.

Generally speaking, *ex post facto* laws are unjust and improper; but there may certainly be occasions, when they become necessary for the safety and preservation of the commonwealth; and although no legislature had previously met, yet the assembly that passed this law, if they were impressed with the necessity of the case, had, incontrovertibly, a right to declare any person a traitor who had gone over to the enemy, and still adhered to them. The validity *and operation of the law, however, [*60
the prisoner is now precluded from controverting, if, at any time before the date of the proclamation, he was a subject of the state of Pennsylvania.

Here, then the matter rests. Had the issue been in the *disjunctive*, the prisoner would clearly have come within the description of an inhabitant of Pennsylvania; but when the word *subject* is annexed, it means a subjection to some sovereign power, and is not barely connected with the idea of territory—it refers to one who owes obedience to the laws, and is entitled to partake of the elections into public office. On this point, therefore, we must again advert to the act of assembly, declaring what shall be treason, which has no retrospect, and to the act for the revival of the laws, which implies a suspension of all the laws from the 14th of May 1776, to the 11th of February 1777. If there were no laws to be obeyed, during that period, the prisoner could not be deemed a subject of the state of Pennsylvania, on the 26th day of September 1776. Whether the legislature meant to include this case, we will not positively determine—it is a new one, and we ought to tread cautiously and securely. But, at all events, it is better to err on the side of mercy, than of strict justice.

The jury found a verdict of *Not guilty.*(a)

SEPTEMBER TERM, 1781.

Respublica v. Joshua Buffington.

Outlawry.

Where A. B., of *West* Bradford, was required to surrender himself by the name of A. B. of *East* Bradford," &c., the variance was held to be fatal.

The Attorney-General filed a suggestion, stating, that Joshua Buffington of the county of Chester, yeoman, being a subject or inhabitant of the state, was by proclamation of the Supreme Executive Council, dated the 2d of October 1780, required, in pursuance of the attainder law, to surrender himself to a justice of the supreme court, &c., on or before the 18th of November 1780, to abide his legal trial for the treasons in the proclamation mentioned, &c. That the said Joshua Buffington did not surrender him-

(a) See Penhallow v. Doane, 3 Dall. 54.

self, &c., whereby he is attainted, &c., and he prays an award of execution.

*61] *Joshua Buffington, the prisoner, pleaded, *ore tenus*, that he is not the Joshua Buffington, in the proclamation named, and was not required to surrender himself, &c. On which the attorney-general replied, that the prisoner at the bar is the same Joshua Buffington in the said proclamation named; and thereupon, issue was joined.

The proclamation being produced on the trial, it appeared, that Joshua Buffington, now, or late of the township of *East* Bradford, yeoman, was therein required to surrender himself, &c., according to the terms of the suggestion.

The evidence was this: That on the 16th of May 1780, a warrant issued to apprehend Joshua Buffington; that about three or four weeks before the date of the warrant, the prisoner had removed from Chester county into the Delaware state; that he was born in Chester county, and had resided there from the year 1776, to the time of his said removal; and that he was the only person of that name in the county. On the other hand, however, all the witnesses agreed, that Joshua Buffington had never lived in *East* Bradford, but always in *West* Bradford township, which were distinct townships to every intent and purpose.

Lewis and *Ingersoll*, for the defendant, contended that this variance between the proclamation, and the proof, was fatal to the proceedings; and cited 2 Hawk. 186, § 119, 120, 121; Id. 189, § 121.

The *Attorney-General* insisted, however, that the only questions to be determined, were, *first*, whether the prisoner is the Joshua Buffington whom the executive council intended to call upon to surrender, &c.; and, *secondly*, whether he is so described, that the description cannot apply to any other person; and he cited, Fost. 79, 87; 3 Bac. 617, 107, 103. But—

By the Court.—Although it may be allowed, that the legislature is not bound to the same strictness, that is required in the descriptions of all indictments; yet, we are inclined to think, that the executive council is so bound. Even in the case of a pardon, if the person intended to be benefited were named of a wrong township, the effect of the pardon would be extremely doubtful.

On the present occasion, though Joshua Buffington of *East* Bradford was called upon to surrender himself; yet, Joshua Buffington of *West* Bradford certainly was not; and there is ground for a presumption, that the prisoner did not think he was the immediate object of the proclamation. The court are, therefore, of opinion, that the indentity is not sufficiently established.

The jury found a verdict, upon the issue, in favor of the defendant; and he was thereupon discharged. In September 1782, he was tried for the offences alleged against him, and was acquitted. But the court ordered him to give security to be of good behavior, and keep the peace, during the war with Great Britain.(*a*)

(*a*) See Respublica *v.* Doan, *post*, p. 86; Respublica *v.* Steele, 2 Dall. 92.

*McVeaugh *v.* Goods.

Competency of witness.

On the trial of an information against certain goods illegally imported, a witness, who assisted in making the seizure, and who stated on his *voir dire* that he expected some compensation from the generosity of the informer, in case they were condemned, but not otherwise, was rejected.(*a*)

Certain goods of British manufacture being imported into the county of Philadelphia, contrary to the act of assembly, passed the 10th of September 1778, they were attached, and this information filed against them. The owners of the goods exhibited a claim, and the merits of the case were brought to trial, at an adjourned court, on the 10th of January 1782, when the following points of evidence were ruled.

In support of the information, one Scull was called as a witness, who, being examined on the *voir dire*, said, that he assisted in making a seizure of the goods; and in case they were condemned, but not otherwise, he expected some compensation from McVeaugh's generosity, although he had received no certain promise of that kind.

Lewis, for the claimants, contended against the admission of Scull's testimony; and urged, that if a man, who is not, in fact, interested, apprehends himself to be so, he will naturally be biassed in favor of that side, on which he presumes his interest to lie; which is a sufficient cause to disqualify him as a witness. See Str. 129.

Sergeant, for the informant, likened this to the case of an heir, who expects to be benefitted by his father's estate, yet, as that really depends on the will and pleasure of the father, it is no ground to prevent his being a witness. Scull has no certainty of reward; he has not even a promise; and whatever may be his expectations, the matter still depends entirely on will and pleasure of the informant. But—

By the Court.—It nearly concerns the administration of justice, that witnesses should be free from every kind of bias. It is true, that Scull has no positive promise of a reward; but, we think, the expectation which he acknowledges, in case the goods shall be condemned, must create such an influence in his mind, as renders it improper for him to give testimony on this occasion.

Lewis offered in evidence a pass from a justice of New Jersey, permitting the goods in question to be conveyed through that state.

Sergeant objected, that the pass of a justice of New Jersey, could not be given in evidence to defeat an act of the legislature of Pennsylvania.

To this, *Lewis* replied, that it was offered merely to obviate any imputation of fraud in concealing it. But—

By the Court, it was declared, that the pass was not admissible as evidence.(*b*)

(*a*) Overruled in Long *v.* Bailie, 4 S. & R. 222.

(*b*) Upon the principal point determined in this case, viz., the incompetency of the *witness* offered, there has been some fluctuation of opinion. In the case of Innis *v.* Miller (2 Dall. 50), a creditor of the defendant, who stated, that he expected, if the de-

*Rapp *v.* Le Blanc *et al.*

Evidence.—Costs.

On an information for goods seized as British goods, and imported into the state of Pennsylvania, the following points were resolved:

1. That the informer cannot be a witness.

2. That, although the informer releases his right to a moiety of the goods, he cannot be a witness; because he is interested in that event; he being liable to pay the costs of the claimants, in case a verdict is found for them.

3. That by the act of assembly, the judge who tries the cause, not being authorized to certify, so as to exempt the informer from the payment of costs to the claimants, he cannot certify.

4. That where the informer called a witness, who was contradicted by another witness of his own, he cannot call his first witness to disprove what the second has said.(*a*)

Lewis, for the claimants. *Blair*, for the informer.

---

fendant recovered, to be paid at least a part of his debt, was rejected, the court saying, "Although a creditor is not excluded from giving testimony, as such, yet, if he acknowledge an expectation that he shall be bettered by the fate of the cause (as in the case of McVeaugh *v.* Goods, which was properly ruled), he is sensible of a positive interest, that must give a bias to his mind." Recent decisions, however, in this state, have gone far to shake the authority of both these cases. In Miles *v.* O'Hara (1 S. & R. 32), an attorney was held to be competent, although he admitted that he *expected* to receive a larger fee, in case his client recovered. In Fernsler *v.* Carlin (3 S. & R. 130), a witness who had expressed his belief that what should be recovered from the defendant would be deducted out of the fortune of the wife of the witness, was held nevertheless to be competent. The case of McVeaugh *v.* Goods was cited on this argument, and according to a MS. note with which I have been favored by Mr. Ingraham, the court expressed strong doubt of the propriety of the decision, although this doubt does not appear in the printed report. In Long *v.* Bailie (4 S. & R. 222), it was expressly decided, that it was not sufficient to exclude a witness, that he *believed* himself to be interested, if he was not so in point of fact, or that he was under an *honorary* engagement which could not be enforced at law. McVeaugh *v.* Goods, and Innis *v.* Miller, were cited by C. J. Tilghman, in the course of his opinion, and he expressed his dissent from the rule laid down by Lord Holt in Fotheringham *v.* Greenwood (1 Str. 129), upon the authority of which M'Veaugh *v.* Goods was decided. In each of the three recent cases (Miles *v.* O'Hara, Fernsler *v.* Carlin, and Long *v.* Bailie), C. J. Tilghman adopting the reasoning of Mr. Sergeant, in the text, compared the case of the witness to that of a child who expects to be benefited by the increase of his parent's estate, but is nevertheless a competent witness. See also Harris *v.* Smith, 3 S. & R. 23; Lewis *v.* Manly, 2 Yeates 200; Henry *v.* Morgan, 2 Binn. 497; Pollock *v.* Gillespie, 2 Yeates 129, and Ludlow *v.* Union Ins. Co., 2 S. & R. 119, 132.

(*a*) See De Lisle *v.* Priestman, 1 Bro. 176, 182; Cowden *v.* Reynolds, 12 S. & R. 281.

APRIL TERM, 1782.

McDill's Lessee *v.* McDill. (*a*)

Deed as evidence.

A deed with an *ink seal*, attested by one witness only, and proved by him before a justice, without having been recorded, admitted in evidence.

A Deed executed by two persons, with one wax, and another *ink* seal, attested by one witness only, and merely proved by him before a justice, without being recorded, was offered in evidence.

It was objected, that by the act of assembly (1 Sm. Laws, 94), a deed must be executed before, and be proved by, two witnesses; and that even that kind of proof was not to be received, unless the party was dead, or otherwise unable to appear and acknowledge the *execution; which was not the case of the lessor of the plaintiff, when the deed was actually proved before the justice. [*64

To this, it was answered, that the act of assembly only related to the proof which entitled a deed to be recorded, &c.; that many deeds might be given in evidence, which were not so entitled; as in the case of a long possession under an old deed. Another act declares that *one* or more subscribing witnesses is sufficient (1 Sm. Laws, 422), and it is established, that the attestation of witnesses is not of the essence of the deed. Before the statute of frauds, the necessity of subscribing witnesses to any instrument, did not exist in England; and there is no instance in which the legislature of Pennsylvania has expressly called for the attestation of two witnesses, but in that of the assignment of a bond.

By the Court.—The signing of a deed is now the material part of the execution; the seal has become a mere form, and a written or ink seal, as it is called, is good.(*b*) Any deed under seal, when proved, is proper to be given in evidence (*Ford* v. *Ld. Gray*), 6 Mod. 45.(*c*) And, we are of opinion, that a deed, the execution of which is sworn to by one witness be-

---

(*a*) This cause was tried at Lancaster N. P., on the 18th May 1781, before McKean, C. J., Atlee and Evans, Justices.

(*b*) s. p. Long *v.* Ramsay, 1 S. & R., 72.

(*c*) In Shrider *v.* Nargan, *post*, p. 68, the court again adopted this broad principle, C. J. McKean saying, "we cannot hinder the reading of a deed under seal, but what use will be made of it is another thing." And in Bioren's Lessee *v.* Keep, 1 Yeates 442, the same doctrine prevailed, against the opinion of Smith, J. These decisions, however, have been disproved of in subsequent cases. In Faulkner *v.* Eddy, 1 Binn. 190, C. J. Tilghman, referring to McDill *v.* McDill, said, "It has been generally conceived, that in that case the law was carried too far." And on the question immediately before him, he remarked, "the case (Faulkner *v.* Eddy) stands nakedly as of one who, having no kind of title, makes a deed conveying his right to another. It has been the practice at *Nisi Prius* to reject the deed in such cases; and I see no reason why it should be altered." So, in Peters *v.* Condron, 2 S. & R. 82, it was observed by the same learned judge, "This decision (McDill *v.* McDill) has been considered a slip in the hurry of business, for if it were law, the administration of justice might be obstructed at the pleasure of any party, by reading papers no way pertinent to the cause." And in the recent case of Hoak *v.* Long, 10 S. & R. 1, it was declared to be a well-established rule, that a deed is not evidence, without some proof of title in the grantor.

fere a magistrate, who certifies the same, is within the rule. Besides, the last act of assembly certainly allows the proof of one witness to be sufficient.(*a*)

Morris's Lessee *v.* Vanderen.

British statutes.—Limitation.—Deed.—Evidence.

The common law has always been in force in Pennsylvania; but statutes made before the settlement of the province have no force here, unless convenient and adapted to the circumstances of the country; and statutes made since the settlement of the province, do not extend to it, unless the colonies are particularly named.

The statute of limitations of 32 *Hen. VIII.*, c. 2, extends to this state; otherwise of the statute of 21 *Jac. I.*, c. 16.

A bare perception of the profits, will not oust a tenant in common; for the statute of limitations to operate as a bar, the possession must be *adverse*.

An interlineation, made after the execution of a deed, will avoid it, though in an immaterial point; and the presumption is, that it was made *after* execution, unless the contrary be shown.

A recital in a deed is not evidence, except against a party claiming under it; but the recitals in an ancient deed are evidence, to prove pedigree.

The "list of first purchasers," is evidence, to show title to lands.

A deed, executed in England, and recorded here, is evidence; so is one, executed in England and acknowledged here, but not recorded. So is the probate of a will, made in England.

A copy of a copy is not evidence.

In ejectment, letters written by a person in no way connected with the title are not evidence, to prove an independent fact.

The plaintiff in ejectment may give in evidence, letters written by the ancestor of the defendant's lessees; and show that the latter have possession of the deeds necessary to establish the title.

The admissions of a party are evidence against him, though made after suit brought.

Several points of evidence were determined in this cause; which was an Ejectment, brought for the recovery of a lot on the west side of Second street, in Philadelphia.

1. The plaintiff, in order to show that the persons under whom he claimed were original purchasers from William Penn, the proprietary, offered in evidence a paper from the proprietary's (or rather surveyor-general's) office, containing the list of names of such persons as were original purchasers; and therein were the names of those from whom the plaintiff derived his title. It was objected to, because the deeds themselves ought to be produced, as it did not appear that they had been destroyed. But it was answered, that the lot in question is appurtenant to a large tract of land, and that the deeds are in the possession of the owners of that large tract; for, on the settlement of the province of Pennsylvania, every one who bought 5000 acres of land in the country, was entitled to certain lots within the city, which became afterwards separated. And—

By the Court.—The objection is overruled, and the paper allowed to be given in evidence.(*b*)

*65] *2. The plaintiff produced the *proprietary's warrants* to make a survey of the lands in question, for a person under whom he now

---

(*a*) s. p. Hamilton *v.* Galloway, *post*, p. 93.

(*b*) See Hurst *v.* Dippo, *ante*, p. 20, and the note to that case.[1]

[1] Commonwealth *v.* Alburger, 1 Whart. 469; Kingston *v.* Lesley 10 S. & R. 383; Baird *v.* Rice, 63 Penn. St. 489.

claimed, without showing any actual survey, but only a paper in the nature of a certificate from a former surveyor-general, stating that such survey had been made. It was opposed, because the present surveyor-general (Lukens) swore that there was no such survey in the office; that surveys of other lots were wanting, and that this paper was copied from a book in the office.

THE COURT ruled, that the paper should not be given in evidence, being only the copy of a copy: but that the book from which it was taken might be read to the jury: and it was said by McKEAN, C. J., that the court has a discretionary power to admit circumstantial evidence of the existence of a record.(*a*) Aleyn 18.

3. The plaintiff offered to prove that certain deeds, necessary to make out his title, were in the hands of, and detained by, the heirs of Israel Pemberton, under whom, the plaintiff insisted, that the defendant was only a lessee; and also to give in evidence sundry letters written by the said Pemberton. It was objected, that the defendant is not to be affected by the conduct of a third person. To which, the plaintiff's counsel answered, that they undertook to prove, that the defendant is no more than a lessee from the heirs of Pemberton; and the possession of the lessee, is the possession of the person entitled to the reversion. But, for the defendant, it was still urged, that his title is not to be made out by the plaintiff; that he rests upon his possession; and that until the plaintiff can make out a good title of his own, the defendant's possession is good against him; for the plaintiff must recover upon the strength of his own, and not upon the weakness of the defendant's title.

But by McKEAN, C. J.—The plaintiff does not mean to show the defendant's *title*, but only his *possession*, which is admitted by the record: if Israel Pemberton was defendant, it would be good evidence against him, and, if the plaintiff proves that the defendant is in under Israel Pemberton, or his heirs, he may give the detention of the deeds in evidence, and also the letters, unless the defendant shows another title. 1 Ld. Raym. 311.(*b*)

A bill of exceptions to this opinion was tendered and allowed; but, I believe, it has never been prosecuted.

4. The plaintiff proceeded to call a witness to prove that the defendant was only lessee; and it was sworn, that since the commencement of the suit (to wit, two days before the trial), the defendant told the witness, that he held under the heirs of Pemberton. This testimony was objected to, because it is a general principle not to receive evidence of anything that happens *after* the suit. But it was answered, that this is only proof of an acknowledgment of a fact *previous* to the suit.

And by McKEAN, C. J.—I recollect one case in the books upon this point;

(*a*) See Todd *v.* Ockerman, 1 Yeates 295; Brown *v.* Galloway, 1 Pet. C. C. 291, 293; Penn *v.* Hartman, 2 Dall. 230; Garwood *v.* Dennis, 4 Binn. 314; James *v.* Stockey, 4 W. C. C. 330.

(*b*) See Andrews *v.* Fleming, 2 Dall. 93; Bassler *v.* Niesly, 2 S. & R. 354; Weidman *v.* Kohr. 4 Id. 174; Johnson *v.* Kerr 1 Id. 25; Reigart *v.* Ellmaker, 10 Id. 27.

and that is, that an acknowledgment of a debt *after* suit, takes it out of the statute of limitations.(*a*) Let the witness proceed.

*66] *5. The plaintiff produced the probate of a will, under the seal of the Prerogative Court of Canterbury, in England, to prove title to the lots in question in those under whom he claimed; which probate was not recorded in the office here. It was objected, that the probate of a will is no evidence as to lands; but it was answered, that by an act of assembly passed in 1705, it is made evidence here; and THE COURT allowed the probate to be read; though excepted to, and admitted in the bill of exceptions.(*b*)

6. The plaintiff produced a deed executed in England, and recorded here; which was read in evidence.(*c*)

7. In order to prove some facts relative to the title of Israel Pemberton, the plaintiff called one Wilson, who objected to being examined, alleging that what he knew of the matter, came to him in confidence. It appeared, that Israel Pemberton was a merchant; that he took Wilson into his house, when he was declining in business; that he did very little in trade afterwards; that Wilson used to copy deeds for Pemberton, and after some time (having gained experience), to draw such deeds and writings as were necessary touching his estates; that Wilson lived in the house with Pemberton, but that he had leave to draw, and did draw deeds for other people. Under these circumstances, his examination was objected to, because, it was said, that he was as much Pemberton's counsel, as any man could be. And Skin. 404; 3 Black. Com. 370; Bull. Nisi Prius, 284; Gilb. L. Ev. 138, 139, were cited. It was answered, that Wilson was neither attorney, solicitor nor scrivener, but only in the capacity of a clerk to Pemberton; that the reason why the law will not allow a counsel or attorney to reveal his client's secrets, is, because a man is obliged to have recourse to professional characters in matters of law; and, therefore, the law protects the client against the danger, and the counsel or attorney against the indelicacy of a disclosure. Wilson's evidence, however, was dispensed with, on the plaintiff's part; not from an apprehension that the point could not be supported; but, as it was said by the counsel, under an impression of its great importance, and a wish to avoid drawing the court into a hasty decision; particularly, as it was found the evidence could be waived, without prejudice to the cause.(*d*)

8. In order to prove possession in one under whom the defendant claimed, the defendant offered to read a letter from Thomas Story, dated in 1735, although Story himself was no way concerned in the title, to prove

---

(*a*) In Marshal *v.* Sheridan, 10 S. & R. 268, GIBSON, J., citing Morris *v.* Vanderen, said, "As to the declarations having been given after the commencement of the suit, it is certain, that the declarations, or acts of a party in the cause, are always evidence, without reference to the time when they were made or done."

(*b*) See Weston *v.* Stammers, *ante*, p. 2, and the note.

(*c*) See Milligan *v.* Dickson, Peters C. C. 433; Griffith *v.* Black, 10 S. & R. 160.

(*d*) The law appears to be well settled, that only such confidential communications are privileged, as have been made to the *counsel* or *attorney* of the party. In Holmes *v.* Comegys, *post*, p. 439, and Corp *v.* Robinson, 2 W. C. C. 388, it was held, that a confidential *clerk* or *agent* might be compelled to testify, and even a person who acquired his knowledge of facts, while he was a student in the office of the attorney of one of the parties, was permitted, in Andrews *v.* Solomon, 1 Pet. C. C. 359, to be a witness.

that he had the possession for Radcliff Meeting, in London. But this was objected to, and disallowed by the court, it being a *particular* fact, which ought to be proved by witnesses on oath, records, &c. The defendant's counsel cited Omichund *v.* Barker, 1 Atk. 21; Ld. Raym. 311; Bull. Nisi Prius, 229, 290; 3 Black. Com. 368; 2 Wils. 273; 3 Burr. 1255; Gilb. L. Ev. 102; and excepted to the opinion of the court, which was allowed in the bill of exceptions.

9. A deed executed in England, and acknowledged here, though not recorded, was read in evidence.

* It was said in the course of this cause, that no act of parliament made in England previous to the settlement of the province of Pennsylvania, shall extend to the province, unless directed to be so extended either by acts of assembly, adjudications of courts, or established usage; and, therefore, the statute 32 *Hen. VIII.*, *c.* 9, against *embracery*, does not extend here; but the statute of limitations, 32 *Hen. VIII.*, *c.* 2, does. An act of assembly (1 Sm. Laws, 105) proves this doctrine. [*67

McKean, C. J., in his charge to the jury, laid down the following positions:—

The recital of one deed in another deed, is no evidence but against the party claiming under it. Vaugh. 74; Gilb. L. Ev. 99.(*a*)

The statute of 32 *Hen. VIII.*, *c.* 9, against *embracery*, does not make void the contract; notwithstanding the cases in 1 Hawk. 249; Carth. 251; 2 Black. 290; for those cases extend only to contracts where no penalties are inflicted.

The statute of 32 *Hen. VIII.*, *c.* 9, is not in force in Pennsylvania; nor is the 21 *Jac. I.*, *c.* 16, but the statute of limitations of 32 *Hen. VIII.*, *c.* 2, is in force here.(*b*) This state has had her government above a hundred years; and the statute of *embracery* has never been extended either by law, or practice, during that period. It is the opinion of the court, however, that the common law of England has always been in force in Pennsylvania; that all statutes made in Great Britain, before the settlement of Pennsylvania, have no force here, unless they are convenient and adapted to the circumstances of the country; and that all statutes made *since* the settlement of Pennsylvania, have no force here, unless the colonies are particularly named.(*c*) The spirit of the act of assembly passed in 1718 supports the opinion of the court.

The statute of limitations, 32 *Hen. VIII.*, *c.* 2, has always been received in Pennsylvania. Fifty years' possession has not been the rule; but it is agreeable to the practice, that sixty years' possession should be a bar.

An *ejectment* is almost the only action for trying the title to lands in this state.

The recitals of, or in deeds, with respect to a pedigree are evidence.(*d*)

(*a*) See Penrose *v.* Griffith, 4 Binn. 231; Garwood *v.* Dennis, Id. 314, 327; Stoever *v.* Whitman, 6 Binn. 416; Bell *v.* Wetherill, 2 S & R. 350; Stewart *v.* Butler, Id. 381; Downing *v.* Gallaher, Id. 455.

(*b*) See Boehm *v.* Engle, and Biddle *v.* Shippen, *ante*, p. 15, 19, and the notes to those cases.

(*c*) See the report of the Judges of the Supreme Court to the legislature on this subject, 3 Binn. 595.

(*d*) S. P. Paxton *v.* Price, 1 Yeates 400.

Respublica v. Shryber.

A bare perception of profits will not oust a tenant in common; and for the statute of limitations to operate as a bar, the possession must be *adverse.*(*a*)

An interlineation, if made after the execution of a deed, will avoid it, though in an immaterial point; nor is it to be presumed to have been made before; the presumption is the contrary, unless otherwise proved.(*b*)

Verdict for the plaintiff, as to one-third of the lot in question, and for the defendant, as to the other two-thirds.

---

*68] * RESPUBLICA *v.* SHRYBER *et al.*

Forcible entry and detainer.

Requisites of an indictment for forcible entry and detainer.
An immaterial and inconsistent averment may be rejected as surplusage.
The defendant cannot give evidence of title, to prevent restitution.

FORCIBLE ENTRY. In this case, it was resolved, on solemn argument, that *title* could not be given in evidence by the defendant, to prevent restitution. 8 *Hen. VI., c.* 9. 1 Burns' Just. 411, § 3.(*c*)

And MCKEAN, C. J., ruled, that the wife of the prosecutor might be examined as a witness to prove the *force*, but only the *force*; for, otherwise, the statutes might be eluded in some cases.(*d*)

SAME CAUSE.

Lewis moved in arrest of judgment, on two grounds: 1. For that the indictment stated, "that the prosecutor was *seised* in his demesne as of fee," without saying when he was seised; so that it might be he was seised at the time of the indictment found, and not at the time of the forcible entry. 2. For that the indictment stated, "that he was *seised* in his demesne as of fee," and "his peaceable *possession* thereof as aforesaid con-

---

(*a*) See Frederick *v.* Gray, 10 S. & R. 182; Cullen *v.* Motzer, 13 Id. 356.

(*b*) S. P. Prevost *v.* Gratz, 1 Peters C. C. 169; Moore *v.* Bickham, 4 Binn. 1. And see Marshal *v.* Gougler, 10 S. & R. 64. Stahl *v.* Berger, Id. 170. Babb *v.* Clemson, Id. 419. Heffelfinger *v.* Shutz, 16 Id. 44.[1]

(*c*) See Pennsylvania *v.* Leech, Addis. 352.

(*d*) In Respublica *v.* Devore, 1 Yeates 501, the prosecutor was admitted to prove the *force* merely.

[1] In Jordan *v.* Stewart, 23 Penn. St. 249, the court say, that the rule laid down by Chief Justice McKean, in Morris *v.* Vanderen, is a harsh one, and has not been followed. Where no disputed claim exists in relation to an interlineation in a deed, or other written instrument, the presumption is, that it was made *before* execution; but where a contest has arisen, and the alteration is beneficial to the party offering the instrument in evidence, it is incumbent on him to explain it to the satisfaction of the jury. If the interlineation or erasure be noted in the attestation clause, this is sufficient; or it may be relieved from suspicion, by the similarity of the ink and handwriting, or the conduct of the parties. Ibid. An immaterial alteration will not avoid a deed; nor a material one, if made by a stranger. Robertson *v.* Hay, 91 Penn. St. 242. But if a deed under which the plaintiff claims, appear upon its face, to have been altered in a material point, it is not admissible in evidence, without an explanation of the alteration. Burgwin *v.* Bishop, Ibid. 336. If alterations are noted in the attestation clause, the burden of showing fraud or forgery, is cast upon the party alleging it. Gratz *v.* Lehigh & Wilkesbarre Coal Co., 1 Kulp 58.

tinued until, &c.," which is repugnant and inconsistent, inasmuch as he could not be both *seised* and *possessed* at the same time.

But the Court overruled both objections: And McKean, C. J., said, that the words, "his peaceable possession thereof as aforesaid," were surplusage, and ought to be rejected.(*a*)

Shrider's Lessee *v.* Morgan.

Title in ejectment.—Sheriff's deed.

The plaintiff, in the first instance, need not show title further back than the person who last died seised, first showing title out of the commonwealth.

The registering of a sheriff's deed in the prothonotary's office, is a sufficient recording, within the statute.

In this cause, McKean, C. J., said, that he had ruled it in a case at Lancaster, that the lessor of the plaintiff shall not be obliged to show his title further back, than from the person who last died seised, first showing the estate to be out of the proprietaries, or the commonwealth.(*b*)

It was objected to by *Lewis* and *Clymer*, that a sheriff's deed of sale of lands, under a writ of *venditioni exponas*, not being recorded in the Rolls Office, according to the act of assembly of 1774, could not be read in evidence. *Sed non allocatur:* Because it was acknowledged *in court, and the registering of it in the prothonotary's office (as is always done) is a sufficient recording within the act.(*c*) [*69

Sergeant and *Ingersoll* opposed the reading a deed in evidence, upon this ground: that by the act of assembly, last mentioned, all deeds not recorded in the Rolls Office, accordingto the particular directions of that act,(*d*) are declared void as against subsequent purchasers; and, therefore, though this deed was dated *before* the sheriff's deed, under which the defendant claimed, yet as it was not recorded until *afterwards*, they insisted, it was void, and could be no evidence at all. *Sed non allocatur:* And McKean, C. J., said, we cannot hinder the reading of a deed, under seal, but what use will be made of it, is another thing; and he cited the case of *Ford* v. *Lord Gray*, 6 Mod 44.(*g*)

(*a*) See Fitch *v.* Rempublicam, 3 Yeates 49; s. c. 4 Dall. 212. Burd *v.* Commonwealth, 6 S. & R. 252. Dean *v.* Commonwealth, 3 Id. 418. Respublica *v.* Campbell, *post*, 354, Co. Litt. 303, n.

(*b*) In ejectment against any other than the proprietary, or one claiming under him, it is not necessary for the plaintiff to show the estate to be out of the proprietary, if a right of entry is proved. Hylton *v.* Brown, 1 W. C. C. 204. Allen *v.* Lyons, 2 Id 475. And it is not necessary to show title out of the commonwealth, where both plaintiff and defendant derive title from the same person. Patton *v.* Goldsborough, 9 S. & R. 47. And see Riddle *v.* Murphey, 7 S. & R. 230; Miller *v.* Wilson, 2 Yeates 294.

(*c*) This decision was recognised by Yeates, J., in McCormick *v.* Mason, 1 S. & R. 96.

(*d*) 1 Sm. Laws, 94, 422.

(*e*) Dill's Lessee *v.* Dill, *ante*, p. 68.

(*g*) See the note to McDill *v.* McDill *ante*, p. 68.

WILCOX *et al. v.* HENRY.

Forfeiture.

A prior *bonâ fide* sale of enemy's property to a citizen, during the enemy's occupation, will prevail over a subsequent seizure thereof, as forfeited.

THE case was this:—In the close of the year 1777, one Stephen Backhouse arrived at Philadelphia, from Liverpool, the troops of the king of Great Britain being at that time in possession of the city. Backhouse brought with him a large and valuable cargo of salt, which he stored in the warehouse of one Pritchard, and after a short stay in Philadelphia, he went to New York (then likewise in the possession of the British troops), consigning the salt to Messrs. Jones, Backhouse and Foulk, of Philadelphia, with directions that they should sell it for him, at the best price they could get, but not under a dollar per bushel. Backhouse, one of the consignees, was no relation whatever of Backhouse the owner. The consignees, accordingly, sold part of the salt to different persons, and on the 17th of June 1778, they sold the remainder to Wilcox, the plaintiff. On the 18th of June 1778 (the day succeeding the sale), the British troops evacuated Philadelphia. In January 1779, it was seized for the commonwealth, as the property of the enemy. And the question was, whether the salt was the property of Wilcox, the plaintiff; or became forfeited to the state of Pennsylvania, as being the property of a British subject?

It is to be observed, that no money was paid by Wilcox to the consignees, at the time of the sale, though the key of the store was delivered to him. The price of the salt was to be a dollar per bushel; and the agreement, at the sale, was, that if the salt should be in the city, when the American army entered it, then the money should be paid for it within (I think) two or three months; but that if the salt should be destroyed or taken by the British troops, in that event, the contract should be null and void. These conditions were annexed to the agreement, from a general apprehension that the

*70] British, *on evacuating the city, would either destroy such stores as they did not want, or take with them those articles which they might stand in need of.

These facts, likewise, appeared in evidence, on the trial; that the consignees had been applied to by one of the plaintiffs, five or six days before the evacuation, to purchase the salt; that for three or four weeks before the evacuation, the citizens of Philadelphia supposed it was intended; that the whole of the British army did not finally leave the city until the morning of the 18th, though their shipping, for a fortnight before, had been, from time to time, dropping down the river; that the price of salt at that time was only three shillings per bushel; and that the plaintiffs have since, to wit, in August 1778, paid the full value of the salt, at the rate of a dollar per bushel, to Jones & Co.

On behalf of the state of Pennsylvania, three points were made: 1st. That the contract between Wilcox and Jones & Co., was not a complete one, inasmuch as no money was paid, nor any possession delivered of the salt. If, therefore, it was not a complete contract, the salt was the property of a British subject, and consequently, forfeited to the state, by the rules of war, and the law of nations. 2d. That admitting the contract to be complete, yet it was made to defraud the state of the forfeiture, and in contem-

plation of the intended evacuation. 3d. That if it was incomplete, though to be made complete by a subsequent event (to wit, the entry of the American army into the city, and the salt still remaining), yet the right of the state to the salt attached, if not sooner, at least, as soon (to wit, when the American army entered) as the right of the plaintiffs; and that, therefore, by the rules of law, the right of the state must be preferred to the private claim.

1st Point. To the first point, it was argued—that all contracts should be mutual; that each of the contracting parties should have an equal remedy against the other for the performance of the contract, or for damages on the non-performance of it; that, in this case, Backhouse being an *alien enemy*, was entitled to no action against the plaintiffs, but depended entirely on their liberality and honor for payment of the money, in case the salt should not be destroyed or taken away by the British troops.

1st *Resp. pro. Quer.* At the end of the war, Backhouse will be entitled to his action against the plaintiffs, for recovery of the money due on the contract; because, though all rights and credits belonging to the subjects of any power at war with another, are, during the war, suspended, as against the subjects of that power, with whom their sovereign is at war, still, on the restoration of peace, those rights and credits are revived, and the subjects of each nation, are in the same situation with respect to debts due to and from each other, as they were before the war.

2d Point. This was argued on both sides, from the various circumstances which appeared in the cause; the counsel for the state contending, that the nature of the transaction was evidently to trick *the state out of the forfeiture, and the advocates for the plaintiffs insisted it was a *bonâ fide* sale. [*71

3d Point. Many cases were cited, on behalf of the state, to show the right of the state ought to be preferred to that of an individual, when they both accrue at one and the same time.

3d *Resp. pro. Quer.* The contract was complete, though liable to be defeated by a subsequent event; and the delivery of the salt was also complete, by the delivery of the key of the store in which it was deposited. The price to be paid was, indeed, the object to be effected by the subsequent event, and not the salt itself. The distinction between a condition precedent, and a condition subsequent was taken, to show that the property being once vested in the bargainee, could not be taken out of him, by any condition to be performed afterwards, which was impossible, repugnant or illegal; and it was urged, that although the right of the state would have attached first, if the plaintiffs had not obtained a prior possession by the actual delivery of the salt; yet, that, having a possession before the American army entered, and even before the evacuation of the British, no such right could possibly attach.

The Chief Justice delivered a charge to the jury of the following purport:—

McKean, C. J.—As the counsel on both sides have quoted many cases, but have not appealed to the court for their opinion on the different points of law, the jury must take the whole together, and form their own judgment upon the subject.

Kennedy v. Fury.

When the British army evacuated Philadelphia, there was a debate in Congress, whether all the property found in the city, and belonging to the king of Great Britain, or any of his subjects, should appertain to the United States, or to the state of Pennsylvania only. It was at length agreed, however, that all public property, such as cannon, artillery, &c., should belong to the United States, and the private property of individuals should belong to the state of Pennsylvania.

An *alien enemy* has no right of action whatever during the war ;(*a*) but by the law of nations, confirmed by universal usage, at the end of the war, all the rights and credits, which the subjects of either power had against the other, are revived ; for, during the war, they are not extinguished, but merely suspended. If, also, a conquered country is *ceded*, the old possessors are entitled to their estates ; and when any country is *conquered*, the possessors are not deprived of their estates, but only change their masters. This is clearly the case between two independent powers, but how will the case be between this country and Great Britain, at the close of the war ? Why, had we been conquered, our lives and all our property would have been the forfeit ; but even as the business now stands, the subjects of Great Britain may, perhaps, claim a revival of the debts due to them from the citizens of America, whilst we, by their acts of parliament, are debarred of the like privilege. It is hard, that the people of America should, during the war, receive
*72] *continental money for specie, and, at the end of it, be deprived of the debts due to them from abroad, whilst they are obliged to pay the debts due from them to British subjects. Unless some care is taken, this may be the case. I would hope, therefore, that the assemblies of the different states will think seriously of it, and, with a view it may be attended to, I have given this hint upon the present public occasion.

With respect to the case before the court, the Chief Justice seemed strongly with the plaintiffs, and the jury found a verdict for them accordingly.

Lewis and *Wilson*, for the plaintiffs. *Bradford* and *Ingersoll*, for the defendant.

APRIL TERM, 1783.

Kennedy *v.* Fury.

Equitable ejectment.

Cestui que trust **may maintain ejectment in his own name, in this state.**

A conveyance was made to A., in trust for B., and B. brought an ejectment on his own demise. *Blair* contended that the demise ought to have been laid in the name of A., inasmuch as the legal estate was in him.

(*a*) See Russel *v.* Skipwith, 6 Binn. 347; s. c. 1 S. & R. 310; Crawford *v.* The William Penn, 1 Peters C. C. 107; s. c., 3 W. C. C. 484.

But by ATLEE, Justice (McKEAN, C. J., being absent), the demise by B. is well enough. We have no court of equity here; and, therefore, unless the *cestui que trust* could bring an *ejectment* in his own name, he would be without remedy, in the case of an obstinate *trustee*.(*a*)

(*a*) This case is frequently referred to as establishing what is now a well-settled principle. See Crunkelton *v.* Evert, 3 Yeates 570; Simpson *v.* Ammons, 1 Binn. 177.

[1] Presbyterian Congregation *v.* Johnston, 6 W. & S. 9; Caldwell *v.* Lowden, 3 Brewst. 63.

COURT OF OYER AND TERMINER, AT PHILADELPHIA.

SEPTEMBER SESSIONS, 1783.

RESPUBLICA *v.* MESCA *et al.*

A foreigner, indicted for a criminal offence, is entitled to a jury *de medietate linguæ*; the statute of 28 *Edw. III.*, *c.* 13, extends to this state.

THIS was an indictment against four Italians for the murder of Captain Pickles; and, upon the arraignment of the prisoners, the court assigned *Ingersoll* and *Swift* as counsel for them. These gentlemen then challenged the array, and moved for an award of a *tales de medietate linguæ;* but the *Attorney-General* controverted the propriety of the motion, and it was twice argued, on the 25th and 29th of September.

The counsel for the prisoners urged, that the Stat. of 3 *Edw. III.*, *c.* 13, was a beneficial law, encouraging foreigners to come into the country; that, in practice, it had been extended to Pennsylvania, before the revolution, and sound policy justified its continuance. In the course of their argument, the following authorities were cited: 1 Penn. Laws 89;[1] 28 *Edw. III.*, *c.* 13; 4 Bl. Com. 352; 2 Hale H. P. C. 271, 272; Dyer 304; Chart. of Ch. II. to Penn; 2 Wils. 75; Salk. 411.

To prove the practice, Thomas Clifford, upon his solemn affirmation, stated, that in February 1764, a burglary was committed in his dwelling-house in Philadelphia; that one Brinkloe, being apprehended upon suspicion, accused William Frederick Ottenreed; whereupon, they were both imprison-

*74] ed and tried; and to the best of *the witness's recollection, Ottenreed was allowed to have a moiety of foreigners on his jury.

The *Attorney-General* observed, that the question turned upon this point—how far the English statutes were extended to Pennsylvania? and by what authority they could be extended, whether exclusively by an act of the legislature, or, likewise, by the adjudications of the supreme court? The sentiments of the foreign jurists seemed, he said, to be crude and undigested upon this subject; but certain principles, which had obtained the authority of a general assent, might serve as a directory to form an accurate judgment. He then adverted to several acts of parliament which did not extend, as the act of limitations, 21 *Jac. I.*, *c.* 16; (*a*) the 28 *Hen. VIII.*, respecting pirates, &c.; and urged, that, by the royal charter, the common law, and

(*a*) See the note to Biddle *v.* Shippen, *ante*, p. 19.

[1] Act 31 May 1718; 1 Sm. Laws, 105.

statute law, relating to felonics were extended; but that statutes merely relating to the mode of trial did not extend; on which account, laws were passed in that respect, soon after the settlement of the province.

With respect to the statute immediately in question, he contended, that it had never been extended by the legislature, because it was thought unnecessary, and might often be greatly inconvenient; for in every case where foreigners were tried, the humane provision of our laws, which allows them counsel, would then be defeated. A trial *per medietatem linguæ* was never granted to Indians, or Negroes; nor is it, indeed, pretended to have taken place in any more than one instance; and that too rests entirely on the recollection of a single witness.

The *Attorney-General* cited 2 Hawk. 420; Tri. per Pais 247; Dyer 357 *a*; Cro. Eliz. 869; Smith's Hist. of New York 24, 243; 2 Penn. Laws, in App. 318; Votes of Ass. Vol. 1, p. 6, 53, 106; Id. in App. 11; 1 Penn. Laws, 88, 114; Votes of Ass. Vol. 2, p. 22, 211, 234; Robin. View State of Europe 395.

The Chief Justice delivered the opinion of the court as follows:—

McKean, C. J.—The point before the court has been well argued; and on a full consideration of the subject, we now find little difficulty in pronouncing our decision. The first legislature under the commonwealth, has clearly fixed the rule, respecting the extension of British statutes, by enacting that "such of the statutes as have been in force in the late province of Pennsylvania, should remain in force, till altered by the legislature;" and it appears in evidence, that the 28 *Edw. III.*, *c.* 13, has been in force in the late province, since a trial *per medietatum linguæ* was allowed in the case of a burglary committed by one *Ottenreed*, in the mansion-house of Mr. Clifford.

Whether it was intended, by the act to which I have referred, to include only such statutes as were in force by an express extension of the legislature; or to comprehend, likewise, such statutes, as have been extended by the judgment of the supreme court, or received there in usage, seems to be, in some degree, uncertain. We *know, however, that many statutes, for near a century, have been practiced under, in the late province, which were never adopted by the legislature; and that they might be admitted by usage, and so become in force, was the opinion of the British parliament, declared in a statute passed in the year 1754, enabling legatees to be witnesses to wills and testaments. If, therefore, the statute in question has been, by any means, legally in force, a necessity is, seemingly, imposed upon us, to grant the challenge to the array, which has been made on the behalf of the prisoners. [*75

But if this was a new case, the judgment of the court would be different; for, the reasons which gave rise to the 28 *Edw. III.* do not apply to the present government, nor to the general circumstances of the country. Prisoners have here a right to the testimony of their witnesses, upon oath, and to the assistance of counsel, as well in matters of fact as of law; which was not the case in England, in the year 1353, when that statute was enacted. We do not think, indeed, that granting a *medietas linguæ*, will, at all, contribute to the advancement of justice; and we know it is a privilege which the citizens of Pennsylvania cannot reciprocally enjoy, as, at this day, there are no juries in any part of Europe, except in the British dominions.

Respublica v. Mesca.

On the ground, however, of the precedent which has been shown, we hold ourselves bound, on this occasion, to allow the challenge, and to grant a trial *per medietatem linguæ*.(*a*)

(*a*) On the subject of the extension of British statutes to this state, see the remarks of C. J. McKean, in Morris *v.* Vanderen, *ante*, p. 67, and the report of the judges in 3 Binn. 595.

In the case of Commonwealth *v.* La Vinez, MS., at a court of Oyer and Terminer, Philadelphia, May 3d, 1822, before Hallowell, president, and the associate judges, the same motion was made, as in Respublica *v.* Mesca, and after argument, a *tales de medietate linguæ* was awarded, on the authority of that case. That part of the stat. 28 *Edw. III.*, c. 13, which gives an inquest *de medietate linguæ*, is said by the judges of the supreme court, in their report, to be in force, but Judge Roberts, in his digest of the British statutes (p. 336), well remarks, that "it is a matter of astonishment how this statute ever became incorporated in our laws." And in a late case in the mayor's court of Philadelphia (Com. *v.* De Mora, Dec. 1824, MS.), an inquest *de medietate* was refused, the court being equally divided in opinion; those who opposed the *tales* holding, that the act of 1805, regulating juries, had in effect abolished it.[1]

[1] It is now provided, by act of 14th April 1834, § 149 (P. L. 368), that no alien shall, in any civil or criminal case whatever, be entitled to a jury *de medietate linguæ*.

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY.

THE HON. EDWARD SHIPPEN, Esquire, was appointed President of the Court of Common Pleas, for Philadelphia County, on the 7th day of May 1784.

Jonathan Bayard Smith, Esquire, was appointed prothonotary of the Court of Common Pleas, for Philadelphia County, on the 25th day August 1777.

JUNE TERM, 1784. (a)

McCARTY *v.* NIXON *et al.*

Special court.

The plaintiff could not have a special court, under the act of 1782, before the return of the writ.

THIS action was commenced returnable to the ensuing term, and now, August 6th, previous to the *return* of the *writ*, *the plaintiff* moved for a

(a) As the following case may give some satisfaction to our sister states, I hope the insertion of it here will not be deemed an improper deviation from my intention to confine the reports of decisions in the common pleas to those which have occurred since the appointment of Mr. President SHIPPEN:—particularly, as I have reason to believe, that the principle of this adjudication, met with the approbation of all the judges of the Supreme Court.

Common Pleas, Philadelphia County.

September Term, 1781.

SIMON NATHAN *v.* COMMONWEALTH OF VIRGINIA.

Property of a sister state not liable to attachment in Pennsylvania.

A foreign attachment was issued against the Commonwealth of Virginia, at the suit of Simon Nathan; and a quantity of clothing, imported from France, belonging to that state, was attached in Philadelphia. The delegates in Congress from Virginia, conceiving this a violation of the laws of nations, applied to the Supreme Executive Council of Pennsylvania, by whom the sheriff was ordered to give up the goods. The counsel for the *plaintiff*, finding that the sheriff suppressed the writ, and made no return of his proceedings, obtained, September 20, 1781, a rule that the sheriff should return the writ, unless cause was shown. [*78

They contended, that the sheriff was a ministerial officer; that he could not dispute the authority of the court out of which the writ issues, but was bound to execute and return it at his own peril. 6 Co. 54. That those cases in England, where the sheriff

special court, under the new act, for granting special courts to plaintiffs (2 Sm. L. 17).

Lewis and *Ingersoll*, for the plaintiff. *Wilson* and *Wiloocks*, for the defendant.

---

was not compelled to return writs issued against ambassadors or their retinue, depended upon the stat. 7 *Ann.*, c. 12, which did not extend to this state.

The *Attorney-General*, on the part of the sheriff, and by direction of the Supreme Executive Council, showed cause, and prayed that the rule might be discharged. He premised, that though the several states which form our federal republic, had, by the confederation, ceded many of the prerogatives of sovereignty to the United States, yet these voluntary engagements did not injure their independence on each other; but that each was a sovereign, "with every power, jurisdiction and right, not expressly given up." He then laid down two positions. 1. That every kind of process issued against a sovereign, is a violation of the laws of nations; and is, in itself, null and void. 2. That a sheriff cannot be compelled to serve or return a void writ.

I. The first point he endeavored to prove, by considering, first, the nature of sovereignty; and, secondly, the rules of law, relative to process issued against ambassadors, the representatives of sovereigns. He said, that all sovereigns are in a state of equality and independence, exempt from each other's jurisdiction, and accountable to no power on earth, unless with their own consent. That sovereigns, with regard to each other, were always considered as individuals in a state of nature, where all enjoy the same prerogatives, where there could be no subordination to a supreme authority, nor any judge to define their rights or redress their wrongs. That all jurisdiction implies superiority over the party, and authority in the judge to execute his decrees; but there could be no superiority, where there was a perfect equality—no authority, where there was an entire independence. That the king of England, as sovereign of the nation, is said to be independent of all, and subject to no one but God; and his crown is styled imperial, on purpose to assert that he owes no kind of subjection to any potentate on earth. No compulsory action can be brought against him, even in his own courts. That a sovereign, when in a foreign country, is always considered by civilized nations, as exempt from its jurisdiction, privileged from arrest, and not subject to its laws. Hence, this inference was drawn, that the court having no jurisdiction over Virginia, all its process against that State must be *coram non judice*, and consequently void. 1 Vatt. p. 2, 133.

It was then observed, that there being no instance in our law books of any process against a sovereign, it was proper to consider the rules of law relative to process against their representatives. The statute of *Ann.* was read, with the history of the outrage that gave birth to it; which act declares that all process against the person, or goods, or domestics of an ambassador shall be null and void, and all concerned in issuing or serving it should be punished as infractors of the laws of nations. That this statute was not introductory of any rule, but barely declaratory of the laws of nations. That there was nothing new in it, except the clause prescribing a summary mode of punishment. That it was a part of the common law of the land before, and consequently extended to Pennsylvania. 4 Bl. Com. 67. 3 Burr. 1480. 4 Id. 2016.

*79] *Hence, it was concluded, that if process against an ambassador be null and void, *à fortiori*, shall it be void, if issued against a sovereign?

That the true reason of the minister's exemption from process is the independence and sovereignty of the person he represents. And although by engaging in trade, he may so far divest himself of his public character as to subject his goods to attachment, yet in every case where he represents his master, his property is sacred. But a sovereign cannot subject himself by implication; he must do it expressly. That though the goods of a sovereign, as well as of an individual, might be liable for freight, or duties, or subject to forfeiture; yet, in those cases, there was a lien on the goods, they were answerable, and the process was *in rem*; in this case, it was *in personam;* and the goods were attached merely to compel the party's appearance to answer the plaintiff's demand

McCarty v. Nixon.

THE COURT denied the motion, the defendant not being in court, nor the action depending for this purpose, until bail filed, or an appearance entered.

Ingersoll, in arguing on the expression in the last act, "action depend-

---

And no sovereign would submit to the indignity of doing this. Hence, it was inferred, that the writ was a mere nullity.

II. Upon the second point, authorities were read, to explain the case produced by the plaintiff's counsel, and to show a distinction between an erroneous and a void writ. That the sheriff was bound to execute and return the writ, although erroneous, if the court had jurisdiction. But when the court had no jurisdiction, the writ was void, and the sheriff was a trespasser, if he dared to obey it; a void authority being the same as none. That in England, the sheriffs were never obliged to return a writ, if upon showing cause, it appeared that the defendant was a public minister, or one of his domestics. 5 Bac. 431; Salk. 700; 2 Barnes; 1 Wils. 20. That suppressing the writ was not making the sheriff judge, because he was obliged to assign a reason for so doing; and upon the legality of that reason, the court was now to determine.

He added, that if the sheriff had attached the goods, he was liable to punishment, and to compel him to return his proceedings, was to oblige him to put his offence upon record, and to furnish testimony against himself. He finally observed, that the writ was void, or it was not. If void, the sheriff need pay no attention to it; if not void, he was obliged to execute it, at all events; and, if so, these inconveniences would follow. That any disaffected person, who happened to be a creditor of the United States, might injure our public defence, and retard or ruin the operations of a campaign; that he might issue an attachment against the cannon of General Washington, or seize the public money designed for the payment of his army. That the states, united or several, would never submit to put in special bail (which must be done, to prevent judgment), and to answer before the tribunal of a sister state.

That the plaintiff was under no peculiar inconvenience. Every creditor of this state or of the United States lay under the same. If his demand was just, Virginia would, upon application, do what was right; if not, and flagrant injustice was done him, he might (if a subject of this state, and entitled to its protection) complain to the executive power of Pennsylvania. He concluded, with observing on the importance of suppressing such measures as the present, at their first appearance, and of preserving the rights of sovereign states inviolate—and prayed that the rule might be discharged.

The counsel for the *plaintiff* insisted, that though Virginia was a sovereign state, yet this ought not to exempt her property in every case from the laws and jurisdiction of another state. That sovereignty should never be made a plea in bar of justice; and that the true idea of prerogative, was the power of doing good, and, not, as it had sometimes been expressed, "the divine right of doing ill." That every person, and all property within this state, was subject to its jurisdiction, by so being within it, except a sovereign power, and the representative of a sovereign power, with his domestics and effects, which he holds as representative. That if an ambassador engages in trade, his property so engaged is liable to attachment, Vatt. b. IV., § 114, and if a sovereign state turns merchant, and draws or accepts bills of exchange, its property ought in like manner to be subject *to the law-merchant, and answerable in the state where [*80
it happens to be imported. That sovereignty is better represented by persons than things; and as any or all the citizens of Virginia would be amenable to the jurisdiction of this state, if they were to come within its bounds, so there is no reason why property brought here should not be attached, as well as the citizen arrested.

That one sovereign may lay duties upon the goods of another; and this appears to have been the sense of congress, by their expressly stipulating, in the articles of confederation, that no duties should be laid by one state on the property of another. That the goods which were attached, were certainly liable for their freight; so, if they had been imported contrary to law, they were subject to forfeiture; process against them might

ing," took this distinction—Where the original writ is purchased out of chancery, the suit cannot be said to be depending, until the return; because the writ gives the jurisdiction, and before the return, the court does not know the cause. This is the case in the common pleas in England. But where the original writ issues out of the court, returnable into the same court, as was the case in the star-chamber, and is the case in this court, there it is *lis pendens*, from the purchase of the writ. To this purpose he cited 15 Vin. Abr. 127, pl. 3, 5, 6, 8; Cro. Eliz. 675; 5 Co. 47 *a*, *b*; 48 *a*; 1 Vern. 318; 3 Bl. Com. 316. See 10 Vin. Abr. 498, pl. 9.

---

issue out of this court, and jurisdiction over them be exercised, the sovereignty of Virginia notwithstanding. That if a vessel belonging to Virginia, should be taken as prize, retaken, and libelled here, Virginia must submit her claim to the decision of the admiralty of Pennsylvania, and could not claim an exemption on account of her sovereignty. That a sovereign state may waive its rights—and by the very act of importing merchandise, it subjects itself to the jurisdiction of the country. That all property in this state is under the protection of the government, and therefore, should be answerable in its turn, and amenable to its laws.

That the statute of *Ann.*, though declaratory, is only declaratory of the ideas which that parliament entertained of the laws of nations. These were often erroneous, and could not be binding on us. That whatever might be the case with regard to foreign ministers, by the articles of confederation, the delegates from Virginia were privileged only in their persons, and not in their goods; and as they represent the state, it was to be presumed, they enjoy every exemption that their sovereign expected or claimed.

They said, that whether Virginia was subject to, or exempt from, the jurisdiction of this state, in the present instance, was not the point now in question: it was only, whether the sheriff should, or should not, obey the command of the court. That by the writ, he was directed to return it to the court, and he was not to withhold the process in contempt of this order, and to stifle the proceedings in their birth. That the sheriff was to act under the judgment of the court, and if he had any doubt about the validity of the writ, he ought to return it. Then the court might, if cause was shown, quash it as illegal. That his not being obliged to return process against ambassadors was owing to the statute of *Ann.*; and this exemption was singular, and not to be extended here. That though a writ might be void, where the court had no jurisdiction of the cause, or issued a writ, which they had no authority to issue; yet the cause here was trespass upon the case, of which the court may hold plea, and the process was a foreign attachment, which they certainly had authority to issue. That to suffer the sheriff to suppress writs, at pleasure, was establishing a dangerous precedent, which in future would be greatly abused.

That the questions upon which this cause depended were important, and deserved the fullest consideration; and that an appeal from one tribunal to another, was the right and the security of the subject. But if the writ was now to be suppressed, there could be no record to be removed, and the plaintiff was left without remedy. They finally observed, that this mode of applying to a court of judicature to decide on the justice of the plaintiff's demand, was every way preferable to that proposed by the attorney-general, of sending him to complain to the executive power, who could give him no redress, but by appealing to arms, and involving the state in a war. They, therefore, prayed that the rule might be made absolute.

THE COURT held the matter some days under advisement; and at their next meeting, THE PRESIDENT delivered it as the judgment of the court:

"That the rule made upon the sheriff, to return the writ issued against the commonwealth of Virginia, at the suit of Simon Nathan, should be discharged."[1]

[1] Stockwell *v.* Bates, 10 Abb. Pr. (N. S.) 881. The true ground o' this decision is, that a sovereign state is not suable in the municipal courts of another jurisdiction, and a foreign

*Hunter's Lessee *v.* Kennedy.

Practice.—Continuance.

On motion to put off the trial of this cause, *Sergeant* tendered the affidavit of John Adams (who called himself the landlord of the defendant, and declared himself interested in the suit) to prove the absence of a material witness.

Lewis and *Coxe* objected, for the plaintiff, that the affidavit should be made by the defendant himself.

But the Court received the affidavit, and ordered the trial off.(*a*)

Rivers *v.* Walker.

Reference.—Practice.

It was ruled in this cause, that notice of the time and place of the meeting of referees, must be served on the party himself, and not on his attorney; unless it be otherwise specified in the rule of reference.

For a contrary practice, the report, in the present instance, was set aside, on motion of *Lewis*, in behalf of the defendant, opposed by *Ingersoll* for the plaintiff.(*b*)

Carlisle *et ux.* *v.* Cunningham.

Liberari facias.—Practice.

Levy obtained a rule to show cause, why a house which had been delivered to the plaintiffs on a *liberari facias*, that issued in this cause, should not now be surrendered to the vendee of the defendant, upon his bringing into court, the principal, interest and costs.

(*a*) See Jackson *v.* Mason and Keely, *post*, p. 185.

(*b*) In Dunkin *v.* Galbraith, 1 Bro. 15, it is laid down as a general rule, that where there is a known attorney, notice must be given to that attorney, and not to the party himself; and it was held, in that case, that notice of *filing* a report of referees might be given to the *attorney*. But where a rule of court requires notice given to the *party*, notice to the *attorney* is not sufficient. Nash *v.* Gilkeson, 5 S. & R. 352. Even in such case, however, notice to the attorney will be considered good, if he did not expressly object at the time of service. Newlin *v.* Newlin, 8 S. & R. 41. And see Geyger *v.* Geyger, 2 Dall. 332. Hutcheson *v.* Johnson, 1 Binn. 59. Hitner *v.* Suckley, 2 W. C. C. 465.[1]

attachment is but a mode of compelling an appearance. Whilst the states have surrendered certain powers to the general government, they have not divested themselves of the attribute of state sovereignty. If they were but foreign corporations with respect to each other, such writ would, undoubtedly, lie; for, in ancient times, the mode of commencing a personal action was by summons, attachment and *distringas*; and as, in practice, there was no personal service of the summons, the first process by which a defendant was notified of the pendency of the suit against him, was by an attachment of his goods. 3 Bl. Com. 279–80; Gilb. C. P. 7; 1 Reeves, 452; see Cooley Const. Lim. 2; Allen *v.* Bareda, 7 Bosw. 204.

[1] See act 23 March 1877 (P. L. 28), which authorizes a service upon the attorney of a resident defendant. Wilcox *v.* Payne, 88 Penn. St. 154.

Lieb v. Bolton.

On the 9th of August, *Lewis* and *Sergeant* showed cause, and the rule was discharged; THE COURT being unwilling to go into the matter in a summary mode, upon mere motion, and expressing their dislike of the *ampliare jurisdictionem*. The principal question was, therefore, left undetermined. (*a*)

---

*82] *LEIB *v.* BOLTON.

Practice.

The court will not set aside the return of a jury of inquiry, unless it appear that there was *no* proper evidence before them.

A MOTION was made, the 10th of November, on the part of the defendant, to set aside the return of the jury of inquiry, on affidavit of irregular proceedings; and the court granted a rule to show cause, &c.

And now, two of the jurors attended and deposed, that Leib's book, supported by his own oath, had been admitted as evidence of the delivery of a quantity of leather by Leib, to the order of Bolton, in part discharge of an agreement between them. But being asked, whether they founded their inquest in any degree upon that evidence, they said it was founded upon that, and concurrent testimony.

In support of the motion, it was contended, that, though the admission of books, in the manner above stated, had been customary; yet that the custom ought not to be carried further than to prove work done, or wares delivered; that the purpose for which they had been introduced, on the present occasion, arose upon a collateral point, to establish a set-off in diminution of the damages, and that it was, therefore, irregular to admit them. With respect to the concurrent testimony mentioned by the jurors, it was said, that as neither the nature, nor effect of it, appeared to the court, it might have been even more improper than the allowance of the books as evidence; but that, in all events, the inquest ought to be set aside, as what did appear, shows it to have been raised so far upon an erroneous foundation. But—

BY THE COURT.—We will not set aside the verdicts of juries of inquiry, nor the reports of referees, upon frivolous grounds. Nor will we examine into the effect of any particular piece of evidence upon the minds of the jury; for, unless it appears, that there was *no* proper evidence before them, we must presume that they had sufficient grounds for their inquest.

Rule discharged.

(*a*) This motion was made when house-rent was rising very rapidly, and the defendant's house, in the present instance, was extended at a very moderate valuation; the residue of the term was, therefore, a great object to both parties. I have not heard, however, of any other attempt being made by the defendant; but, I think, the court recommended the *scire facias ad computandum*, which issues in England, where tenant by *elegit* holds over, after being satisfied for debt and costs.[1] In Wall *v.* Lloyd, 1 S. & R. 320, it was held, that the valuation by the inquest was not conclusive upon the plaintiff, where the land was taken out of his hands by a subsequent execution, before

[1] A *scire facias ad computandum* may issue, on presentation of an affidavit, showing a *primâ facie* case of satisfaction. Scofield *v.* Harbeson, 9 Phila. 38.

Sergeant, for the plaintiff. *Lewis* and *Levy*, for the defendant. See Cases temp. Hard. 381.

---

*Hagner *v.* Musgrove. [*83

Reference.—Practice.

Report of referees set aside, where it appeared, that they had examined witnesses in the absence of the parties.

The plaintiff having had a verdict in the absence of the defendant, and having agreed to withdraw it, and submit to a reference, three persons, nominated by the court, accordingly met. Upon entering into the case, the parties, who were present, began a warm altercation, which proving troublesome to the referees, they ordered the disputants to withdraw, and called the witnesses, one after another, examining them separately out of the hearing of both plaintiff and defendant, and finally reported in favor of the former.

These facts being established, the report was set aside, on motion of the defendant's counsel.(*a*)

Levy, for the plaintiff. *Lewis*, for the defendant.

Snowden, Assignee, *v.* Hemming. (*b*)

Construction of the stay-law.

Under the act of 1784, giving a stay of execution, the date expressed in the bond was conclusive, and evidence was not admissible of another date.

In an action of debt upon a bond, judgment being obtained, and execution issued, *Wilcocks* moved to stay proceedings, upon this ground; that though the bond was dated June, the consideration, for which it was given, arose before the 1st of March 1781; and therefore, he contended, that his client was within the protection of the act of assembly, passed the 23d of December 1784 (P. L. 412), which entitles a defendant to a stay of execution, for a certain time, upon tendering the interest and costs to the sheriff.

Bradford, for the plaintiff, was prepared with an affidavit to controvert the facts advanced in support of the motion; but he forbore reading it, and

---

his debt was satisfied, but that he was to account for the real profits, that is, such as he might have made with reasonable care and diligence. Whether the court could interfere, when the plaintiff retained possession during the term, was said by C. J. Tilghman, never to have been decided; but Judge Yeates seemed to think, that he would be concluded by the inquest (p. 325-6.) See the note at p. 62, &c., of 1 Sm. Laws.

(*a*) Hollingsworth *v.* Leiper, *post*, p. 161. Chaplin *v.* Kirwan, *post*, p. 187. Passmore *v.* Pettit, 4 Dall. 271.

(*b*) This case appears, from Mr. Rawle's MSS., to have been argued in March 1758, and not in 1784, as would seem from its place in the text. This explanation is necessary, since the question was upon the construction of an act passed on the 23d of December 1784.

insisted that the court could not travel into a consideration of the transactions for which the bond was given.

By the Court.—It would occasion infinite trouble and confusion, were the defendant's doctrine to be admitted, and it is impossible to say where the mischief would end. It is true, that before a jury, proof may be made of the consideration, and of the time of delivering a bond; but this act of assembly, which, in particular cases, grants a delay of execution to the defendant, upon the tender of the interest and costs, must, surely, at the same time, recognise the written instrument as conclusive evidence of the contract; and we can inquire no further.(*a*)

Wilcocks took nothing by his motion.

(*a*) See Field v. Biddle, 2 Dall. 171.

SUPREME COURT OF PENNSYLVANIA.

The Hon. Thomas McKean, Esquire, LL.D. was re-appointed Chief Justice of the Supreme Court, on the 29th day of July 1784.

The Hon. William Augustus Atlee, Esquire, was re-appointed a Judge of the Supreme Court, on the 9th day of August 1784.

The Hon. Jacob Rush, Esquire, was appointed a Judge of the Supreme Court, on the 15th day of February 1784, in the room of the Hon. John Evans, Esquire, deceased.

---

*SEPTEMBER TERM, 1784. [*85

Rodman *et al.*, Executors, *v.* Hoops's Executor.

Evidence.—Book-entries.

A book-entry of money paid, may be read, to prove the fact of such entry, in support of the presumption of payment arising from the lapse of nineteen years.

Whether or not a book, offered in evidence, be an original or a transcript, is for the jury.

In this cause, the defendants offered in evidence an entry made in the books of their testator, of money paid in discharge of a promissory note. This was acknowledged to be the original entry; but there was no proof by whom it was made, nor whether the person who made it was dead or alive.

By the Court.—Let it be read to the jury; not as evidence that the defendant has paid the note, but merely that such an entry was made, nineteen years ago, of the payment of a note of twenty-three years' standing; and to support the general presumption of payment, after such a length of time. Nor is this to be drawn into precedent; for our allowance of the evidence is founded on the particular circumstances of this case.

To prove another point, in the same cause, a book was offered, in the form of a ledger, containing, in some instances, references to a waste-book. Notwithstanding this, it was insisted, on the one hand, to be an original, and not a transcript; but denied on the other; and the person, who, it was said, could prove it, was incapable of attending on account of sickness.

The Court ordered the book to be read; leaving it to the jury to de-

termine, on the face of it, whether it was an original or a transcript; and directing them, in the latter case, to pay no regard to it.(*a*)

---

*86] RESPUBLICA *v.* DOAN.

Outlawry.

Where a party is outlawed by judicial proceedings, on his being brought into court, the practice is, to direct execution, by an award upon the roll.

AARON DOAN, being attainted of a robbery in the county of Bucks, by process of outlawry, was brought before the court, on the 24th day of September 1784; and, after hearing his counsel upon several exceptions to the outlawry (which were all overruled), execution was awarded against him, on the 9th day of October. The following correspondence then took place between the Honorable the Supreme Executive Council, and the judges; in the course of which several important points of law were stated and considered.(*b*)

On the 22d of November 1784, the President and Supreme Executive Council addressed the following letter to the judges:

Gentlemen:—We have perused, and attentively considered, the transcript of the record transmitted by you, of the attainder of Aaron Doan; and as it appears to us a case of a novel and extraordinary nature, which, being once established as a precedent, may greatly affect the lives, liberties and fortunes of the freemen of this commonwealth, we cannot, consistently with our ideas of duty, issue a warrant for his execution, until the doubts and difficulties that present themselves to our view are removed.

To take away the life of a man, without a fair and open trial, upon an implication of guilt, has ever been regarded as so dangerous a practice, that the law requires all the proceedings in such a mode of putting to death, to be "exceedingly nice and circumstantial," as Blackstone says; and "any single minute point omitted, or misconducted, renders the whole outlawry illegal, and it may be reversed; upon which reversal, the party accused is admitted to plead to, and defend himself against the indictment." 4 Black. Com. 315.

This liberality of spirit seems to have advanced with the improvement of the human mind, and of those laws from which our own are composed: for, by the statute of 4 & 5 *Wm. & M.*, *c.* 22, wisely and benevolently reciting, that, "it is agreeable to justice, that proceedings in outlawries in criminal cases,

---

(*a*) In Curren *v.* Crawford, 4 S. & R. 5, DUNCAN, J., said, the book "must be an account of the daily transactions of the party . . . and the entries made about the time of the transaction. It is not to be a register of past transactions, but a memorandum of transactions as they occur. If the book appear, on investigation, or examination of the party by the court, not to be such an one, the court may reject it as incompetent. If this does not clearly appear, it is to be submitted to the jury to decide on." See further on the admissibility of books of original entries, the note to Poultney *v.* Ross, *post*, p. 238.

(*b*) As the opinions given upon this occasion have governed several subsequent cases, I am persuaded, it will not be thought improper to insert them here, though they do not come within the strict idea of judicial decisions.

should be as public and notorious, as in civil causes, because the consequences to persons outlawed in criminal cases are more fatal, and dangerous to them, and their posterities, than in any other causes;" it was enacted, that, "upon issuing an *exigent*, in a criminal case, there should issue a proclamation according to the form of the statute made in the one and thirtieth year of Queen Elizabeth," &c. And the first mentioned statute was made perpetual by the 7 & 8 *Wm. III.*, *c.* 36. [*87

It is our desire to regulate our conduct by the just maxims, and generous principles, that have been established, for keeping under proper directions, and restraining within proper limitations, this menacing part of jurisprudence. We shall, therefore, be obliged, if you will be pleased to take the questions now proposed into your consideration, and to favor us with your answers.

I. Whether the proceedings in this case are founded on common law, the act for the advancement of justice, or on any other, and what acts of assembly or of parliament?

II. Whether there have been any, and what modern instances, in England, prior to our Declaration of Independence, of persons being executed upon outlawry by judicial proceedings alone?

III. Whether there has ever been any, and what, instance in Pennsylvania, of a person being executed upon outlawry by judicial proceedings alone?

IV. Is such a mode of attainder compatible with the letter and spirit of the constitution of this state, which establishes, with such strong sanctions, the right of trial by jury? See section the ninth of the Declaration of Rights —section the twenty-fifth of the Frame of Government, &c.

V. What authorities and precedents are considered as most applicable to the present case?

VI. If this outlawry is principally founded on the act for the advancement of justice, do not these words, "attainted of the crime whereof he is so indicted or appealed as aforesaid, *and* from that time shall forfeit and lose all his lands and tenements, goods and chattels;" imply, by force of the copulative "and," that this forfeiture was the penalty designed to be incurred by such an outlawry; and may not the word "execution" in the following part of the clause, as it is connected with the word "trial," be reasonably applied to the other criminals there mentioned, so as to render it consistent with the preceding penal expressions? And is not this construction, *in favor of life*, strengthened, by the improbability, that the legislature of Pennsylvania intended to make the law in this case more sanguinary here, than the law of England at that period, which, it is apprehended, required one or more writs of *capais*, *an exigent*, five exactions, at five different county courts, a proclamation at the door of a place for divine worship, &c., before an outlawry could be incurred? Tremaine's P. C. 281, &c.; Statutes before mentioned; Hale; Hawkins; Bacon; Blackstone.

VII. As the person was brought into the supreme court by *habeas corpus*, ought not judgment to have been *expressly* pronounced; as the reason assigned for judgment not being pronounced "afresh," in *Ratcliff's case*, who was brought into the king's bench by *habeas corpus* is, "it having been pronounced before:" And in the cases of *Stafford*, *Bartstead*, *Okey*, and *Cobret*, who were attainted by act of parliament (cases nearly resembling this), "the Chief Justice pronounced the *usual* judgment as in cases of high treason." Foster 44. [*88

VIII. If all the proceedings in the present case are as rigidly exact as the law requires, in this uncommon mode of taking away life, ought Council to form a new kind of warrant for execution, thereby ordering, that on a certain day, the offender be hanged by the neck till he be dead, or order in the warrant, that on a certain day, execution be done upon the offender, leaving the sheriff to decide what is the punishment by law to be inflicted.

It would be agreeable to us, if you, gentlemen, would also be pleased to consider, whether the outlawry in the present case, may not be legally reversed, and the offender brought to a trial, for these defects in the proceedings.

I. By the act for the advancement of justice, it is directed, "that the *capias* shall be returnable before the justice of that court, where such party shall be indicted or appealed, at the supreme or provincial court next after the taking of such indictment or appeal;" and that the party shall be called on by proclamation "to appear before the said justices at the said supreme court;" and it is set forth in the indictment, in the present case, that it was taken at "a court of oyer and terminer and general gaol delivery;" but, the *capias* in the present case directs the party to be called on by proclamation, to "appear before the justices of the supreme court." 'Tis true, the same persons are justices of both courts; but the title of "that court where the party shall be indicted," expressly required by the act, is omitted.

II. It is not returned by the sheriff, that the party was called on by proclamation, "to answer to the Commonwealth," as by the act aforesaid, and by the *capias* is directed.

III. It is not set forth, that the *capias* was "delivered to the sheriff three months before the return thereof," as the same act requires: Nor does the sheriff even return, that he made the proclamation by virtue of the said *capias*. The proclamations might be made without the writ; and though it may be inferred, that they were not, ought inferences against the accused to be admitted, in a case so highly penal?

IV. Is not the *form* of the proclamation prescribed by the act aforesaid, and ought it not to have been strictly pursued; and does not the first line of that form require the proclamation to begin with a setting forth of the indictment?

V. Ought it not to appear, *when*, and how, the party was "for the cause aforesaid *before* committed to the custody of the sheriff of the city and county of Philadelphia," or, at least, that it was *subsequent* to the proclamations in Bucks county?

VI. The act before mentioned, and the *capias*, order the sheriff to
*89] "make proclamation *in* every court of quarter sessions," &c., *but the sheriff returns that he "caused public proclamation to be made at two several courts of quarter sessions," &c. The word "*at*" is uncertain. So is the word "*public*." Neither of them is used in the act. The requiring "the sheriff to make the proclamations," appears to have been intended to oblige his attendance in person at so solemn a transaction, leading to such fatal consequences. It is not returned, that he was *present*. As to the other words, proclamations might be, in some sense, said to be "public," and "at the courts," and yet not "in the courts." Where life depends on proclamations, it seems scarcely possible to adhere with too scrupulous an exactness to injunctions positively directed by law, for giving them their destructive efficacy.

VII. It does not appear by the return, *who* was called on by proclamation to appear.

The offender has represented to us, by petition, that, at the time when the outlawry was sued forth against him, he was in New York, then in the possession of the British army. What regard ought to be had to that circumstance, you, gentlemen, can determine.

I am, with respect, Gentlemen,

Your most obedient and very humble servant,

JOHN DICKINSON.

To these inquiries the following answers were returned, addressed to his Excellency the President, in Council, on the 15th of January 1785.

Sir:—We had the honor of receiving on the 29th of November last, the letter from your Excellency, and the Honorable the Supreme Executive Council, dated the 22d of the same month, respecting the case of Aaron Doan, who stands attainted of a robbery, in the county of Bucks, by outlawry, and against whom execution has been awarded. In this letter, the council express difficulties with regard to their issuing the warrant for his execution, and have desired the opinion of the judges on nine several questions. Before we gave our answers to these questions, it was expected that all the judges might consult together, in court upon them; but, as we now despair of this for some months, we shall offer what we think may be material on the occasion, without further delay.

Previously to the giving our answers, we beg leave to observe, that the judges do not hold themselves bound to assign any reasons for their judgments; and when they do give reasons, it is always *in public.*(*a*) This is mentioned, that the present proceeding may not be drawn into a precedent.

* We would next observe, generally, that an outlawry for felony, is a conviction and attainder of the offence charged in the indictment, [*90 and has been as long in use as the law itself. The intention of it was to compel all men to submit to the laws of their country, and to prevent their escaping justice, by flying and staying away, until all the witnesses are dead. It is a very important part of the criminal law; and we do not find an occasion, where any question of law, upon a writ of error to reverse an outlawry in a *criminal* case, has ever undergone a *serious* litigation, before that of John Wilkes, Esquire, in 1770.(*b*)

If there be anything improper in taking away the life of a man, upon an attainder by a judicial outlawry, it belongs to the legislature to alter the law in this particular; the judges cannot do it. But council can interpose their mercy.

In our answers, we shall refer to the questions, in the order they are placed in your Excellency's letter, without inserting them here.

Answers to the Questions.

I. The proceedings in this case are founded on the act of assembly,

---

(*a*) Lord Morly's case, Kelyng 54.

(*b*) See 2 Hale, H. P. C., 205, 207, &c.; 4 Burr. 2541, 2549; 2 Hale 208; 4 Burr. 2551.

entitled, "An act for the advancement of justice, and more certain administration thereof."

II. Our law-books do not inform us, except very rarely, of the executions of capital offenders; they are generally to be found in the histories of the times, or in the periodical publications; and therefore, we cannot mention, with certainty, any modern instances in England, prior to our Declaration of Independence, of persons being executed upon outlawry by judicial proceedings alone; but Lord Chief Justice Mansfield, in *Wilkes's case*, expresses himself thus: "flight, in criminal cases, is itself a crime. If an innocent man flies for treason or felony, he forfeits all his goods and chattels. Outlawry, in a capital case, is as a conviction for the crime; and many men, who never were tried, have been executed *upon the outlawry*." 4 Burr. 2549.

III. We do not know of any instance in Pennsylvania, of a person being executed, upon outlawry by judicial proceedings alone; but a certain David Dawson was executed, since the Declaration of Independence, in consequence of an attainder, by virtue of a proclamation of the Supreme Executive Council, and judicial proceedings thereupon. In that case, the court awarded execution, by pronouncing the usual sentence of death: no judgment having been given before.

IV. We conceive such a mode of attainder compatible with the letter and spirit of the constitution of this state, and that it is no infringement of the right of trial by jury; for, that the party had not that trial, was owing to himself; he was not deprived of *the right. As well, indeed, might an offender, who confessed the fact in court, by pleading guilty to the indictment, after sentence, complain that he had not a trial by jury. By refusing to take his trial, he tacitly seems to have admitted himself guilty. 2 Hawk. fo. 170, ch. 23, § 53; 2 Hale 208.

*91]

V. We conceive all the authorities and precedents of outlawries in capital cases at common law, in England, as applicable to the present case; there being no difference, but in the form and manner of proceeding to the outlawry, which is made by the before-mentioned act of assembly. In particular, we would refer council to 4 Burr. 2527, and to 2577, where almost all the authorities are collected together and fully considered.

VI. In the act for the advancement of justice, &c., § 17, the legislature have declared, "That the party indicted of a capital offence, not yielding his body to the sheriff, at the return of the *capias*, shall be, by the justices of the supreme court, pronounced outlawed, and attainted of the crime whereof he is so indicted. And, from that time, shall forfeit all his lands and tenements, goods and chattels: which forfeiture, &c., after debts paid, shall go, one-half to the governor for the time being, &c., and for defraying the charges of prosecution, trial and execution of such criminals." Had the clause ceased at the end of the words "attainted of the crime whereof he is so indicted," no doubt remains with us, but that the party was liable to suffer all the pains of death prescribed by law for the offence specified in the indictment; and the words following, so far from altering this construction, in our opinion, show, by the most necessary, evident, and strong implication, that the party was liable also to be executed; for the expenses of the execution are to be defrayed out of his forfeited estate. We, therefore, have

no doubt, that Aaron Doan, besides the forfeiture of his estate, has forfeited his life.

VII. We conceive, that, where a person is attainted by an act of parliament or assembly, and is brought before the court, and execution awarded, the practice most generally has been, to do so, by pronouncing the express sentence; and the reason given for it, is, because no judicial sentence had been pronounced before; but in case of an outlawry by judicial proceedings only, no express sentence, is given upon the party's being brought before the court, but merely an award on the roll, that the sheriff do execution at his peril, or execution awarded by the court; because a judgment had been given before. Judgments in criminal cases are divided into two kinds: 1. By express sentence, to the punishment proper for the crime. 2. Judgments without any such sentence. Of the latter, there are two kinds: 1. Outlawry. 2. Abjuration. Judgment of outlawry, in England, is given by the coroner, and is in these words, "Therefore, the said A. B., by the judgment of the coroner of our Lord the King, of the county aforesaid, is outlawed." The party is thereby as much attainted, [*92 and shall forfeit and lose as *much, as if sentence had been given against him upon a verdict or confession. Finch of Law, 467; 3 Inst. 52, 212; Cro. Car. 266. &c. And after such outlawry, if the party is brought before the court of king's bench, "execution shall be awarded against him, but no sentence pronounced, because the outlawry is a judgment, and no man shall have two judgments for one offence." 2 Hawk. ch. 48, § 23, fo. 447, and the cases there cited. But in the present case, the judgment was pronounced before by this same supreme court, that Aaron Doan is outlawed and attainted of the crime whereof he is indicted, and we do not think, that it would have been formal to have given a second express judgment. This matter was mentioned, and well considered by the judges, at the time they awarded execution in the present case of Aaron Doan.

VIII. The judgment against Aaron Doan is, that he is outlawed and attainted of the crime whereof he is indicted. The record shows that he was indicted of a robbery; in which case, the express judgment is, "that he shall be taken back to the place from whence he came, and from thence to the place of execution, and there be hanged by the neck, until he is dead." The judgment of outlawry implies all this. We, therefore, think, that a warrant for the execution may properly issue, giving these special directions to the sheriff. We find, that executions have been commanded to be done by the court, without writ, sometimes by writ; and that the king, in England, has, by special warrants, frequently remitted part of the punishment and directed the rest, and changed hanging for beheading, though some have doubted of his authority to do so, in the latter instance. 2 Hawk. ch. 51, §§ 4, 5, fo. 463; Finch of Law, 478; *Halloway's Case*, 3 Mod. 42; Cro. Jac. 496.

IX. We do not think, that the outlawry, in the present case, can, at this stage of the business, be legally reversed. The several critical and verbal objections now stated by council, as well as most of those preceding, were made at the bar, in behalf of the prisoner, by his counsel learned in the law, answered by the prosecutor for the commonwealth, and overruled by the court, upon full discussion and mature consideration. The court cannot make errors, nor reverse for errors which do not exist, or which they cannot

see; they must be satisfied that there are errors. There may, perhaps, be some small mistakes in the transcript of the record by the prothonotary, as we have not seen it, but there is no error in the record itself, that we have been able to discover. There has never been a question seriously litigated in Westminster Hall, upon a writ of error to reverse an outlawry in a capital case. Such a writ was never granted, but from justice, where there really was error, or from favor, where the king was willing the outlawry should be reversed. They are grantable merely *ex gratiâ regis*, and when granted, there never was any opposition made, and the courts reversed them upon slight and trivial objections, which could not have prevailed, if opposed,
*93] or the precedent had been of any consequence; which could not be, as the king had the power to refuse *the writ. All was by consent of the king, and the reversal took place, though there was really no error at all.

It is as much a breach of duty, to reverse a good, as it would be to affirm a bad outlawry. The mischief goes farther than an unrighteous sentence in the particular case; for, to reverse without an error, is to abolish that part of the law.

Your Excellency further informs us, that the offender has alleged in his petition to council, that he was in the city of New York at the time the outlawry was sued forth against him. In answer to this, we can only say with certainty, that if he had put any material fact in issue, it would have been tried.

Upon the whole, three indictments for robbery have been found against him in Bucks county; by the examinations of Jesse Vickers, Solomon Vickers, John Tomlinson, Israel Doan, Joseph Doan, &c., he was a principal in them, and eight or nine others in that county, and the counties of Philadelphia, Chester and Lancaster; he has been duly outlawed for one of them, and execution legally awarded, according to our judgments.

We have the honor to be, with the greatest respect,
Sir, your Excellency's and the Council's,
Most obedient humble servants,
THOMAS McKEAN,
GEORGE BRYAN,
JACOB RUSH.(*a*)

(*a*) Since the publication of these reports, the reporter has been favored with the reasons offered to the Supreme Executive Council, in reply to the opinion of the judges, by Mr. DICKINSON, the President. A duty to the public would sufficiently justify the insertion of this important document, that the subject might appear entire; but, I confess, that I am actuated by the additional motive of paying a tribute of respect to the wish of one who has done honor to his country, to his profession, and to his species. The document will be found in the Appendix. (In the present edition, it has been thought most convenient to introduce it in this place.)

Proceedings of the Supreme Executive Council of Pennsylvania, in the case of the Commonwealth *v.* Doan, subsequent to the opinion of the Judges.

In Council.—January 1784.

Council taking into most serious consideration the transcript of the record, transmitted to them by the honorable the judges of the supreme court, of the conviction and attainder of Aaron Doan, by outlawry, the *capias* directed to the sheriff of Bucks county to take the said Aaron Doan, &c., the return thereof, the letter of council to the said judges, and their answer, and the consequences to citizens of this commonwealth, of establishing a precedent, in a capital case, altogether new, thereupon.

Resolved,(*a*) That it does not appear, that a warrant can be legally issued for putting the said Aaron Doan to death, upon the outlawry aforesaid, for the following reasons:

I. The outlawry of the said Aaron Doan being founded on the "Act for the advancement of justice, and more certain administration thereof," passed May 31st, 1718, the said act ought to have been strictly observed, and its directions pursued with an "exceedingly nice and circumstantial"(*b*) exactness, especially, as the penalty would be so ruinous, and the precedent may be so dangerous. But, the proceedings aforesaid vary from the said act in these instances:—

1st. It is not returned by the sheriff, that the party was called on by proclamation "to answer to the commonwealth," as according to the said act and the *capias* ought to have been done.

2d. It does not appear (unless by implication or intendment, in this case inadmissible) that the *capias* was "delivered to the sheriff three months before the return thereof," as the said act requires; it not being even returned, that the proclamations were made by virtue of the *capias*.

3d. The said act and the *capias* "order the sheriff to make proclamation," &c., but, the sheriff returns that he caused public proclamation to be made, &c. He does not say, that he was present when the proclamations were made: yet, in many cases of a much inferior nature, a sheriff's presence is indispensably necessary.(*c*)

4th. The act directs the making "proclamations *in* every court of quarter sessions, &c.," but, the sheriff returns, that it was "made *at* two several courts of quarter sessions, &c."

5th. The act says, that proclamation shall be made for the party to "appear before the said justices, at the said supreme court;" but the sheriff

---

(*a*) Council having determined not to issue a warrant for execution, did not formally pass these resolutions, which were submitted to them by their learned and humane President.

(*b*) 4 Bl. Com. 320. "It seems generally agreed, that *in favor of life*, an outlawry of *treason* or *felony* might be avoided by plea, that the defendant was in prison, or in the king's service beyond sea, &c., at the time of the outlawry pronounced against him. But I take it to be generally agreed, that no outlawry for any other crime (against a party rightly described) can be avoided by the plea of any matter of fact whatever." 2 Hawk. P. C. 460. "By *Magna Charta*, no man can be outlawed, but according to *the law of the land*." 1 Bl. Com. 142.

(*c*) 4 Bacon's Abr. 441.

returns, that the party was called upon by proclamation "to appear at the supreme court."

II. The sheriff returns on the *capias*, that the party was called upon "to appear at the day and time within specified," which might be done by reference only in the proclamation to the writ, without expressly mentioning the day and year when the party ought to appear. The return ought expressly to mention the day and year; and no intendment, however strong, is sufficient to supply the defect.(*a*) Where life depends on proclamations, there cannot be too much exactness required, in order that the party may have due notice.

III. The sheriff returns, that "he caused public proclamation to be made, at two several courts of general quarter sessions of the peace, held at Newtown, for the county of Bucks, &c." But it was solemnly determined, on repeated argument, and the most serious consideration, by all the judges in *Wilkes's* case, to which the honorable judges of the supreme court refer—that, from the precedents, it appears, that a series of judgments have required a technical form of words, in the description of the county court, at which an outlaw is exacted; that after the words "at my county court" should be added the *name* of the county;(*b*) and after the word "held," should be added, "for the county of ———" (naming it again). In the return in the present case, the name of the county is not mentioned, before the word "held."

Upon the authority of these *precedents*, the outlawry in *Wilkes's* case was

---

(*a*) 2 Hale's P. C. 203, p. 4; 3 Bac. 767, 772; 4 Burr. 2559. The return says, "I have caused public proclamation to be made, in manner and form as within I am commanded." "This is certainly too loose; the proclamations are not sufficiently set out for the court to judge, whether they were properly made or not. I thought this error fatal." Lord Mansfield, in *Wilkes's case;* and the error would have been "fatal" if proclamations had been necessary in that case; but from peculiar circumstances they were not necessary. In *Aaron Doan's* case they are acknowledged to have been necessary. They are the most essential parts of the whole proceedings. Indeed, by the act of assembly on which this outlawry is founded, the *exigi facias* and *the writ of proclamation* are combined. The distinct nature of them is stated in 3 Bl. Com. 283, 284, &c., and in the Appendix, 16, 17, &c. "I beg to be understood that I ground my opinion *singly* upon the authority of the cases adjudged; which as they are on the favorable side, in a criminal case highly penal, I think, ought not to be departed from; and therefore, I am bound to say, that for want of these technical words, the outlawry ought to be reversed." Lord Mansfield, in *Wilkes's case.* The other three judges spoke *seriatim;* and concurred with the chief justice. *A multo fortiori*, the *positive* terms of a *law*, in a case vastly more penal, "*ought not to be departed from.*"

(*b*) *Alder* was outlawed for murder. The sheriff returned—"at my county court held at D., in the county of Northumberland," and did not say, "at my county court of Northumberland, held, &c.," and this was holden to be error; 2 Roll. Rep. 52, cited by Lord Mansfield, with several other cases of the like purport, in *Wilkes's case.*

"If an outlawry be returned, that the party was exacted (called) at three several times, in the tenth year of James, and that he was a fourth time exacted the fifth day of February, and did not appear, without mentioning any year, and was a fifth time exacted such a day in March, in the tenth year of James, although it may be intended that he was the fourth time exacted in the tenth year of James, yet the outlawry shall not be good by intendment." 2 Roll. Abr. 803; 2 Hale P. C. 203. If any intendment or implication could support an outlawry, this seems to have been sufficient.

reversed; and *they*, together with the remarkable judgment in his case, demonstrate the present outlawry to be erroneous; for certainly, it cannot be easier to take away the *life* of a citizen, by an outlawry, in this state, than to inflict a slighter punishment, by outlawry, on a subject, in England.(*a*)

If bare precedents establish a mere form of words with so much weight, though the judges were clearly of opinion, that "they began against law, reason, and common sense," and that "there was not a color, originally, to hold these words to be necessary," and where the penalty is so far inferior—how much more ought they to be regarded, and how religiously ought the express injunctions of a law, wisely and benevolently intended to guard against loose proceedings, to be revered, when those proceedings are to consign a fellow-citizen to *death?*

So "critical" have the judges in England been with respect to outlawries, those vindictive supplements to a severe code of criminal jurisprudence,(*b*) that the use of figures to denote time, as in the return in the present case, or the addition or omission of a single letter, as in this return the writing "Doane" for "Doan," has been held a good objection for reversal.(*c*)

IV. It appears very doubtful also, whether the issuing a warrant for the execution of Aaron Doan, would be a regular procedure, for the following considerations: 1st, Because, there never has been "an instance in Pennsylvania of a person being executed upon outlawry, by judicial proceedings alone," though the "Act for the advancement of justice," &c., was passed near seventy years ago. 2d, Because, not only would such a prosecution to death be more sanguinary, than the law then was in England, but would also oppose that mild system, which the constitution of this commonwealth has adopted. 3d, Because, it would weaken that security, which the constitution appears to have intended for its citizens; it being a dangerous mode of proceeding, that if admitted, ought to be regulated by the exactest cautions; as a precedent of this kind, established in times of tranquillity, may become a very destructive engine of policy, in times less peaceable. 4th, Because, it seems to be unnecessary, the penalty—"forfeiture of lands and tenements, goods and chattels," expressed in the act, appearing to be a sufficient punishment, where guilt is not proved in the usual manner. 5th, Because, the "Act for the advancement of justice," &c., is too obscurely worded. That act, in preceding parts, enumerates many capital offences, and some not capital, though very heinous, in every case of both kinds mentioning the punishments to be respectively inflicted on the criminals, the modes of trial, and the judgments to be given.

It then goes on, in the 17th section, to proceedings of outlawry, with much inaccuracy of expression and confusion of meaning. The words are not, as the honorable judges have stated, that "the party indicted of a

---

(*a*) 4 Burr. 2563, &c.

(*b*) "Either from a want of attention to these principles (of truth and justice, the feelings of humanity, and the indelible rights of mankind, in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition and revenge; from retaining discordant political regulation, which successive conquerors or factions have established in the various revolutions of government," &c. 4 Bl. Com. 8.

(*c*) Style, 182, 334; Cro. Eliz. 204; Cro. Jac. 576; 3 Bac. 767.

capital offence, not yielding his body to the sheriff, shall be outlawed and attainted," &c., but, that "any person indicted or appealed for any of the said crimes, &c., without any distinction between offences "capital" or not capital.

Afterwards, in directing the proclamations, a new subject, not before mentioned in the act, is introduced into it, and the "person so indicted or appealed is to answer, &c., of the treason, felony or *trespass*, whereof he is so indicted or appealed." This clause is immediately succeeded by another, that refers to all offences whether capital, not capital, or only trespasses, and makes the same provision in them all—"if he who is so indicted or appealed, comes not at the said day of return of the said *capias*, and yield his body to the sheriff, he shall be, by the justice of the said supreme court, pronounced outlawed and attainted of the crime whereof he is so indicted or appealed as aforesaid. And from that time, shall forfeit and lose all his lands and tenements, goods and chattels: which forfeiture and *all other* forfeitures expressed or implied by the said judgments, to be given upon the said capital offences mentioned in this act, after such criminals' just debts and reasonable charges of their maintenance in prison, are deducted shall go, one-half to the governor for the time being, towards support of this government, and for defraying the charges of prosecution, trial and execution of such criminals; and the other half or residue thereof shall go to such criminal's wife and children," &c.

Thus, the words "which forfeiture" refer to "trespasses" as well as to "capital offences," and then, by a faulty connexion with the words "other forfeitures"—which "other forfeitures" rest on principles totally different, that is, on "trials and judgments" before directed in the act, carry forward the confusion, until, by grammatical construction, the words "which forfeiture" are made to relate to the word "execution," in cases not capital, and even in cases of "trespass," which indubitably was never intended by the legislature.

The words of the act just cited, and which seem to have had an influence on the honorable judges, to wit, "upon the said capital offences mentioned in this act," plainly refer to the "other forfeitures and judgments," which had been prescribed and directed in parts of the act prior to that, which treats of outlawry.

Indeed, the honorable judges, for sustaining a construction, that couples the word "execution" with the punishment of outlaws, seem to have relied on an "implication," to them appearing "most necessary, evident and strong," but still an "implication." This distinction claims attention. The "other forfeitures" mentioned in the act depend on "the offences being capital:" the forfeiture on outlawry, does not.

Lastly, The act, by giving no direction on the point, leaves involved in great obscurity the question—in what county the party is to be executed, when the offence is charged to be committed, the indictment is found, and the proclamations are made in *one* county, and he is outlawed and attainted in *another*—which is the present case.(*a*)

(*a*) See the act of 23d September 1791, 3 Sm. Laws, 37, regulating the process upon outlawries.

HAMILTON'S Lessee *v.* GALLOWAY.

Evidence.

A deed, duly probated, though not recorded, may be read in evidence.

A DEED proved by the affidavit of one of the witnesses, before a justice of the court of common pleas, but not recorded, was offered in evidence.

It was objected, however, that this attestation is no proof of the deed, at common law, unless it be an ancient deed, and possession is proved to have gone along with it; for, the witness ought to appear in court. Nor is it admissible, under the act of assembly, for that expressly requires it to be recorded.

Yeates answered, that the point had already been ruled in *McDill* v. *McDill* (*ante*, p. 63). And—

BY THE COURT.—The deed may be read in evidence; for, the recording does not contribute to the proof of the deed, *which is established by the oath before the justice; the recording only gives the deed a special operation by the express provisions of the act of assembly.(*a*) [*94

BURKE'S Lessee *v.* RYAN.

A sheriff's deed admitted, after a long possession, without producing the record.

EJECTMENT. On the trial of this cause, in deducing the plaintiff's title, a sheriff's deed was produced, but no part of the record therein.

Sergeant contended, that if the title was set forth, it was necessary to prove every part of it; that between the parties, the *fi. fa.* and *vend. exp.* may only be shown; but that against a stranger, the pleadings, verdict and judgment, ought to be produced. Gilb. L. of Ev. 9, 10.

On a question from the opposite counsel, *Sergeant* admitted, that, in New Jersey, it was not the practice to produce more than the sheriff's deed; but insisted that, of late, it had been frequently required, and that in strictness, it was indispensably necessary. But—

BY THE COURT.—As the possession has gone more than twenty years along with the deed, it is unnecessary, in this case, to require further proof. And the CHIEF JUSTICE added, that within his knowledge, it had not been customary, in any case, to produce the record.(*b*)

Lewis and *Mifflin*, for the plaintiff. *Sergeant*, for the defendant.

(*a*) This cause was tried at Carlisle N. P., on the 24th of May 1784, before McKEAN, C. J., ATLEE and RUSH, Justices.

(*b*) After a long possession under a deed, it has been usual to dispense with proof of its due execution. In a recent case, it was said by Judge DUNCAN, that thirty years possession seems the fixed time, and he intimated that perhaps twenty-one years, the period of limitation, might be sufficient. McGinnis *v.* Allison, 10 S. & R. 199. See also Arnold *v.* Gorr, 1 Rawle 223. The practice, however, with respect to producing the record, in the case of sheriff's deeds (at least, where long possession has not accompanied them), is at present different from that stated by the Chief Justice in the text. It is laid down in many cases, that a sheriff's deed cannot be given in evidence, without producing the judgment and execution under which he made the sale. See Wilson *v.* Mc-

Hight *v.* Wilson.

Execution of will.

A will of real estate need not be under seal; nor subcribed by the witnesses to its execution.
A will may be proved by other than the attesting witnesses; and if proved by them, they need not all be called.

This was a feigned issue to try the validity of a will, against the probate of which, a *caveat* had been entered in the register's office. The plea was insanity in the testator; and evidence was given of habitual drunkenness, old age, weakness of body, shortness of memory, and a few incoherent expressions. The jury, however, in a very short time, gave a verdict for the plaintiff in the issue, who was the devisee in the will.

The Chief Justice, in his charge to the jury, informed them, 1st. That it was not necessary that a will, devising real estate in this commonwealth, should be sealed. 2d. Nor that all the subscribing witnesses should prove the execution. 3d. Nor that the proof of the will should be made by those who subscribed as witnesses.[1] 4th. Nor that the will should be subscribed by the witnesses.(*a*)

Veaugh, 2 Yeates 86; Hartshorne *v.* Wright, Peters C. C. 64; Weyand *v.* Tipton, 5 S. & R. 332; Hampton *v.* Speckenagle, 9 Id. 212. And the rule is the same with respect to a deed of land, sold under an order of the orphan's court, which cannot be read, without producing the record. Hartshorne *v.* Wright, Hampton *v.* Speckenagle, *ut supra*.

(*a*) See Lewis *v.* Maris, *post*, 278. See also Hock *v.* Hock, 6 S. & R. 47; Eyster *v.* Young, 3 Yeates 511; Harrison *v.* Rowan, 3 W. C. C. 580; Rosseter *v.* Simmons, 6 S. & R. 452; Walmsley *v.* Read, 1 Yeates 87; Arndt *v.* Arndt, 1 S. & R. 256.

[1] See Irvin *v.* Deschamps, 11 W. N. C. 365.

HIGH COURT OF ERRORS AND APPEALS

OF PENNSYLVANIA.

SEPTEMBER SESSIONS, 1784.

TALBOT, *qui tam*, &c., *v.* The COMMANDERS and OWNERS of three Brigs. (*a*)

Admiralty jurisdiction.—Marine trespass.—Prize.

The state admiralty court had jurisdiction of a marine trespass; and an appeal lay to the high court of errors and appeals.

The owners of letters of marque are responsible for injuries committed on the high seas, by the commanders of their vessels, at least, to the value thereof.

A vessel is not entitled to share in the proceeds of a prize, merely by seeing the capture made.

Talbot *v.* The Owners of the Achilles, Patty and Hibernia, Hopk. Dec. 85, modified.

THIS cause was of great consequence, not only on account of the property depending on its decision, but because the following questions were determined upon solemn argument. 1. That the owners of Letters of Marque are responsible for injuries committed on the high seas, by the commanders of vessels sent out by them, at least, to the value of the vessels. 2. That in cases of capture from enemies, persons in other vessels acquire no right, merely by seeing the capture made. 3. That the judge of the admiralty for this state, may legally take cognisance in causes similar to this. 4. That the appeal in such cases to the high court of errors and appeals for this state, is regular.(*b*)

It was an appeal from a decree in the Admiralty on the following case: Silas Talbot, commander of the armed sloop Argo, belonging to, and in the

---

(*a*) For the decree in the Admiralty in this case, and the evidence upon which it was principally founded, I beg leave to refer the reader to a small volume of reports of Cases in the Admiralty of Pennsylvania, published by the Honorable Francis Hopkinson, Esq., the Judge of that Court; and printed by Dobson, in Philadelphia. In this book will, likewise, be found several important decisions upon questions of Hypothecation.

(*b*) To understand the arguments in this cause, it may be necessary to premise that the counsel for the respondent contended, that the appeal lay to the Court of Appeals, instituted by the United States; and the counsel for the appellants, that the Court of Admiralty for this state had no jurisdiction in this case.

service of these states, duly commissioned, sailed from New London, in the state of Connecticut, the 29th of August 1779, on a cruise. On the 6th of September, after an engagement of three hours, he took as prize upon the high seas, an armed letter of marque vessel, called the Betsey, of two hundred tons burden, with a valuable cargo, belonging to subjects of Great Britain, not being inhabitants of Bermuda, and bound for New York, then in possession of the British naval and land forces. He took the commander and eleven of the people out of the prize, leaving three in her, and put on board a prize-master and eleven other hands, with instructions to proceed to New London. The firing was heard, and the engagement, for more than an hour, seen by persons on board three letter of marque brigs that had lately sailed from Philadelphia. During the engagement, the Betsey was perceived from the three brigs, bearing towards them. Her surrender was also seen from on board them. The prize-master, in obedience to his instructions, proceeded on his voyage, in company with the Argo, for New London.

*96] Some time after, the three brigs *were discerned from on board the Betsey. Towards evening, they chased the Argo and Betsey. The next day, early in the morning, the three brigs were seen from on board the prize and the Argo, chasing them. The brigs approached fast under British colors. Captain Talbot, finding it impracticable for the prize to escape, with a trumpet, hailed her, directing the prize-master to throw off the rope, and lie too with the prize, until the three brigs should come up with her, adding, that he with the Argo would run a little to leeward and lie too also —and that if the brigs should prove to be American, the prize-master should endeavor to obtain permission for the prize to come down by herself and inform him of the brigs being friends. In a short time, the brigs came up, and from one or two of them, under British colors, the Betsey was fired at twice, she then bearing British colors reversed, according to the custom of prizes, and being in the latitude of 39 degrees 4 minutes, and the longitude of 71 degrees 24 minutes. When first hailed, the people on board the Betsey answered, she was from Montserrat. Persons from two of the brigs, one of which had fired at the Betsey, boarded her. Among these was W. D. from the last-mentioned brig. The commander of this brig was informed by the prize-master on board the Betsey, that she was a prize to the Argo, commanded by Captain Talbot; that the vessel then in sight was the Argo; that he was put on board the Betsey as prize-master, by Captain Talbot; he showed him his written instructions as such; but said the Betsey had been taken three days before. W. D., from on board the Betsey, told the said commander, that the prize-master denied having seen the brigs the day before, or that she was then captured; but from every circumstance, and from the report of one of her English sailors, he was convinced, she was the same vessel seen engaged the day before. On board the brig, to the commander of which this information was given, were a boatswain and sailmaker, who had been taken by Captain Talbot, about ten days before, in a vessel from London, and sent by him prisoners to Philadelphia, and shipped there. One of the persons put into the Betsey by Captain Talbot, knowing them, mentioned this fact in conversation on board the said brig, to W. D. The person thus put on board by Captain Talbot also said, that the Betsey had been taken three days before. The papers on board the Betsey were examined by W. D., in behalf of the three brigs, and the number of names

specified in the English papers, was found to correspond with the number of persons then on board. From these papers, it appeared, that she was a British vessel bound from Montserrat to New York. W. D. made several other examinations on board the Betsey, on behalf of the three brigs, and in the course of them, was informed by a seaman who belonged to her, while possessed by the British, that she was taken the day before. This sailor also said, she sailed from Montserrat. Before W. D. left Philadelphia, he had heard in the coffee-house there, a few days before he sailed, that the Argo, a New England privateer had taken *the Dublin cutter, fitted out full of men-of-war's men. While these examinations were made, [*97 the two other brigs chased the Argo, under all sail, upon which Captain Talbot, concluding they must have been British cruisers, made sail before the wind, and soon left them. The commanders of the three brigs took the prize-master and hands out of the Betsey, who were carried to Spain, except one or two of the least considerable, and also took out of her two cannon, small arms, powder, ball, two coils of cordage, and some other articles. They then put a person on board her as a prize-master, and men from each of the brigs, with written orders, dated the 7th of September 1779, and signed by them all, directing him to "take charge of her as prize to the brigs Achilles, Patty and Hibernia; carry her into Delaware, Chesapeake, Egg Harbor or Boston, but to get her, if possible, into Delaware, Chesapeake or Egg Harbor, for fear of the sloop Argo's falling in with her, begging him to stand to the southward that night, and strive hard for Philadelphia." These orders were signed on board the brig, the commander of which had directed the examinations before mentioned, on board the Betsey. The Betsey sailed off, close by the wind, to the southward, was afterwards retaken, carried into New York, and restored to the former owners. On the 17th of September 1779, congress resolved, "that in consideration of the distinguished merit of Colonel Silas Talbot, a commission of captain in the navy be given him, and that the marine committee be directed to provide a proper vessel for him, as soon as possible." On the first of March 1780, congress resolved "that any interest the United States may have in the capture of the Betsey, by the sloop Argo, Captain Silas Talbot, be relinquished to the said captain, and the officers, seamen and marines, under his command, at the time of the capture." On the 13th of March 1780, Captain Talbot, *qui tam*, &c., filed his bill in the court of admiralty for this state, against the three brigs, their owners and commanders. Process issued accordingly. On the 27th, the owners came severally before the court, and entered into stipulations for the performance of the decree. August 29th, a plea to the jurisdiction filed, "for that in cases of damages to be assessed or recovered to make satisfaction for a wrong or trespass to person or property, the prosecutions ought to be in courts of common law." Replication, "that the cause of action was within the jurisdiction of the admiralty." Plea dismissed, *respondeant ouster* awarded, and plea of *not guilty* filed. July 19th, 1783, decree, that the libellants have and recover of the respondents 12,791*l.* 5*s.* 0*d.*, with costs, and on the 22d, the respondents appeal.

The cause was ably argued on several days, and now, at an adjourned session, held the 14th of January 1785, the PRESIDENT delivered the resolution of the court.

Talbot v. Three Brigs.

DICKINSON, President.—There are two principal questions concerning jurisdiction in this cause.

*98] *First. Whether the court of admiralty for this state had jurisdiction?

Second. Whether this court has jurisdiction?

The first has been subdivided into these *secondary* questions:

1st. Could the court of admiralty for this state take cognisance, as an instance court, supposing this cause not to be a cause of *prize?*

2d. Did that court take cognisance as a prize court?

It is acknowledged by the counsel for the appellants, that if this is not a cause of *prize*, the court of admiralty might take cognisance as an instance court, it being now settled, that damages may be assessed in the admiralty—if it was not for an objection arising from the act of assembly for regulating and establishing admiralty jurisdiction in this state. By that act, the judges of the admiralty shall "have cognisance of all controversies, suits and pleas of maritime jurisdiction, *not cognisable at the common law*, and thereupon, shall decree as the maritime law, the law of nations, and the laws of this commonwealth shall require." The objection made is, that the present controversy is cognisable at common law.

It is manifest from this act, that in framing it, the legislature took into consideration the English statutes relating to things done upon the high seas, and particularly the statutes of 13 *Ric. II., c.* 3 & 5, and 2 *Hen. IV., c.* 11, by which, "Admirals and their deputies are prohibited from meddling with anything done within the realm of England, but only with things done upon the seas, according to that which hath been duly used in the time of Edward the third," and it is "declared, that the court of the admiral hath no manner of conusance, power or jurisdiction of any contract, plea or quarrel, or of any other thing done or rising within the bodies of counties, except in cases of death or mayhem done in great ships, being in the main stream of rivers beneath the points(*a*) of the same."

It is clear, even from these cautions against encroachments of the admiralty upon the courts of common law, and from the well-known dispute mentioned in Coke's 4th Inst., that the jurisdiction of that court, as to "things done upon the sea," is acknowledged to be proper: and that, as to them, the jurisdiction of the common-law courts was *not* proper, but only acquired by a fiction in supposing them to have been done in the same county, when they were not. 3 Inst. 134, 143; 4 Bl. Com. 43, 106, &c.; Fortescue de Laudibus 67, *et in notis.* The common-law courts had a great advantage: they used it: there was no superior court to *prohibit* them. They went beyond the "*credo quia impossibile est;*" for they, upon certain suggestions, *without* "*believing*" them, but *knowing* them to be both *false*

*99] and *impossible*, assumed jurisdiction; and would *not permit evident truth to be regarded. With such labored ingenuity has the jurisdiction of common-law courts, as to acts upon the high seas, been sustained, to the great mortification of Sir Thomas Rydlye and other learned civilians,(*b*)

(*a*) Doctor Zouch, in his "Jurisdiction of the Admiralty," p. 85, urges strong reasons against this construction; and in Owen's Reports, p. 122, it is said by the court, that the statute of 15 *Ric. II.* is misprinted. For the translator mistook *bridges* (*ponts*) for *points*, that is to say the Lands-End.

(*b*) *Fictio, est in re certa, ejus quod est possibile, adversus veritatem, pro veritate a jure facta assumptio.* Doctor Godolpin's view of Admiralty Jurisdiction, p. 84.

the former, with much commendation from the rest, very gravely undertaking to prove, that a ship could not sail in Cheapside, in the city of London,(*a*) the place usually assigned in suggestions, as the scene of naval transactions.

Yet, notwithstanding these statutes, mariners have, in England, been allowed to sue for wages in the admiralty, upon contracts made there, within the body of a county, "against the statute expressly," as was held by the judges, when that great man, Lord Chief Justice Holt, presided in the King's Bench (*Clay* v. *Sudgrace*), 1 Salk. 33. The reasons were, that the remedy was easier, because they could join in the suit, and better, because the ship would be answerable.

In the present case, the owners, masters and sailors of the three brigs could not be jointly sued, at common law. If they could not, what a multiplicity of actions must be brought? Supposing the owners, commander and men of the Argo could join in a suit at common law, one of them might destroy the action by a release.(*b*) The vessels are not liable in the same manner at common law, as they are in a court of admiralty.

If the court of admiralty for this state cannot take cognisance of things which courts of common law may draw into their cognisance, it seems to have been nugatory in the legislature to have given that court any other jurisdiction than in cases of *prize;* for even in the case of wages, justly a favorite object of admiralty jurisdiction, mariners may sue for them at common law.

It appears to have been the intention of the legislature, that justice should be done in the easiest and best manner, and that by the words "not cognisable at common law," should be understood "not properly cognisable at common law."

The next *secondary* question is so connected with the definition of *a cause of prize*, and the treating of *that* subject introduces so many considerations concerning relative circumstances in these states, and the Law of Nations, and these again are so combined with inquiries as to the jurisdiction of this court, that they cannot be conveniently, at least, not easily separated. We will at present, therefore, pass to the second *principal* question, reserving until that shall be discussed, what peculiarly relates to the question we now leave.

This state has all the powers of independent sovereignty, by the Declaration of Independence, on the 4th of July 1776, except what were resigned by the subsequent confederation, dated the 9th of July 1778, but not completed by final ratification, until the first of March 1781.

*By the confederation, the United States are vested, among other things, with the "sole and exclusive power of establishing rules for deciding in all cases what captures on land and water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal, in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally, appeals in all cases of captures." [*100

(*a*) Zouch, p. 131; God. p. 105; 3 Bl. Com. 107.
(*b*) 3 Lev. 355.

Such a court was established by the style of "The Court of Appeals in cases of capture." Acts of Congress, May 24, 1780. By the commission, the judges are "to hear, try and determine all appeals from the courts of admiralty in the states, respectively, in cases of capture, which now are, or hereafter may be duly entered and made in any of the said states." Acts of Congress, February 2d, 1780.

It was resolved by congress, May 24, 1780, "that all matters respecting appeals in cases of capture, now depending before congress or the commissioners of appeals, consisting of members of congress, be referred to the newly erected court of appeals, to be there adjudged and determined according to the law."

It is necessary to enquire, what is the reasonable and legal meaning of the words of the confederation, and of congress, in their several acts relative to this subject, for that is the true meaning. Thus we shall be led into a construction, by which the positive words may be properly and justly modified.

What are the foundations of such a construction here? 1. The counsel for the respondent are themselves compelled to qualify the generality of the expression, "establishing courts for receiving and determining finally appeals in all cases of captures," by adding, *as prize!* The addition is indispensably necessary; for without it, the words would comprehend every kind of taking, on land and water, in peace and war. Having been obliged to go so far, in qualifying the extent of the original expression, we are under the same necessity of explaining the terms of qualification themselves; and certainly, we have the same right, founded on reason and law, to explain them, that we had to introduce them. In doing this we shall find—2. That "captures, as prize, by citizens of the United States, may be carried into foreign countries, and be legally proceeded against in the courts of admiralty there; and therefore, it is to be inferred, that the confederation intended only such capture," brought *infra præsidia* of the United States. That this was the intention thereof, further appears, as—3. Congress, in the commission and resolution before mentioned, have shown their sense of the words "cases of captures," by using them in reference to appeals "in cases of capture, which then were duly entered and depending," as well as to future cases; but none were "then entered and depending," except where the "captures" were brought *infra præsidia* of the United States.

*101] This sense of congress will *appear still more plain, from their several resolutions, prior to the confederation; which were in force at the time of the capture made by Captain Talbot, and which were the groundwork of the ninth section of the confederation. "November 25, 1775. That it be recommended to the several legislatures, as soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being, to determine concerning captures to be made. If the capture be made on open sea, the prosecution shall be in the court of such colony as the captor may find most convenient; provided, that nothing in this resolution shall be construed so as to enable the captor to remove his prize from any colony competent to determine concerning the seizure, after he shall have carried the vessel, so seized, within any harbor of the same. That in all cases, an appeal shall be allowed to congress, or persons appointed by them. That when vessels are fitted out by private persons, the captures made, shall be to the use of the

owners. December 5. That in cases of re-captures, the re-captors shall retain for salvage, according to the time, &c. March 23, 1776. That all vessels and goods belonging to inhabitants of Great Britain, taken on the high seas, by armed vessels of private persons, and commissioned, being libelled and prosecuted in any court erected for trial of maritime affairs in any of the colonies, shall be deemed and adjudged to be lawful prize. Vessels and goods taken near the shores of a colony, by the people, or a detachment of the army, shall be deemed lawful prize, and condemned in the court of admiralty of that colony. Commissions to be obtained, and bonds to be given for observance of instruction from congress. Instructions to the commanders of private vessels of war: "You shall bring such vessels, &c., as you shall take, to some convenient port of the United Colonies, that proceedings may thereupon be had in due form, before the courts which are or shall be there appointed to hear and determine causes civil and maritime. You shall bring one or two of the principal persons of the vessel, as soon as may be, to the judge of such court, to be examined, and deliver to the said judge all papers, &c. You shall keep and preserve every vessel, &c., by you taken, until they shall, by sentence of a court properly authorized, be adjudged lawful prizes, not breaking bulk, nor suffering such a thing to be done." 4. By the maritime law of nations, the appropriation of jurisdiction to a particular court of admiralty, depends upon the capture being *infra præsidia*, 3 Bl. Com. 108; that law regarding proceedings *in rem*, the acquittal or condemnation of the ship or goods. Answer of the British court, to the memorial delivered by the order of the King of Prussia. *Exposition des motifs*, 11; (*Tenemoulin* v. *Sandys*) 12 Mod. 143. It would be injurious to nations, if it was otherwise; for it would cause competition of jurisdictions, and would occasion frauds. The usual method is simple and fair. 5. The articles in the treaties of the United States with France, the United Netherlands and Sweden, with relation to prizes, refer to the cases of prizes conducted into the ports of the contracting powers, *relying on cautions against malversations and contraventions to be given by commanders of private vessels of war, rules and regulations for deciding the legality of prizes, and trials in courts of admiralty generally. 6. An authority to "establish rules for deciding in all cases, what captures on land or water shall be legal, and courts for receiving and determining finally, appeals in all cases of captures," as prize, brought *infra præsidia* of the United States, together with the other powers vested in congress, will sufficiently obviate the mischiefs apprehended from the irregularities of citizens of confederated America upon the high seas. [*102

Foreigners are protected by the confederation, from the irregularities mentioned; for, congress can, "exclusively, appoint courts for the trial of piracies and felonies committed on the high-seas," and can send out a naval force to cruise for and seize the offenders. If the respondent was a Frenchman, and the decree goes against him, he could not justly complain; for he instituted his suit in an American court. If the appellants were Frenchmen, and the decree goes against them, they could not justly complain, for they took, without battle, by force and violence, from a friend and ally, that which in their sight, according to their own allegations and proofs, he had before fought for and captured, and afterwards voluntarily put themselves within the jurisdiction, precinct and power of an American court. What

are the sentiments of learned authors, treating of the law of nations, upon such an occasion? *Quæ ab hostibus capiuntur, statim capientium fiunt*;" which is to be understood, *when the battle is over.* Voet, and many writers he refers to, maintain with great strength, *per solam occupationem, dominium prædæ hostibus acquiri.* One argument used to prove it, is, that "the instant the captor has got possession, no friend, fellow-soldier or ally can take it from him, because it would be a violation of his property;" Lord Mansfield, delivering the resolutions of the court, in the case of *Goss and another* v. *Withers* (2 Burr. 693). In either case, and in the strongest light in which the affair can be viewed, it is no more than a matter to be treated of between their sovereign and the United States. 2 Shower 232; Raym. 473. If it be said, that congress should have a legal mode of making compensation, by rectifying improper decisions against foreigners, thereby to prevent disagreeable consequences, it is a doctrine that cannot be universally admitted, for reasons too plain to be insisted on. If it be confined to acts on the high seas, provision has been made by the confederation, in the cases where it was judged necessary. What the rulers of nations desire and stipulate for, in treaties, as to transactions on the high seas, is to secure their people from being plundered by the citizens or subjects of those with whom they treat. That great point being guarded, and it is guarded here, the danger of consequences from cases that rarely occur, complicated with a variety of circumstances, and decided upon in open courts, are not to be apprehended. When sovereigns are determined to quarrel, they will never want pretences; *103] but while they revere the *sacred obligations of justice and humanity, or the precious sentiments of the good and wise, in their own and succeeding ages, they will not disturb the repose of the world by violating the law of nations, upon slight claims of their subjects, or, "*in re minime dubia.*" Answer of the British court, 23; Vattel, lib. 11, ch, 4, 5, 7. Neither can one of these states prey upon another, without violating the confederation; for, by that, "No vessel of war shall be kept up, in time of peace, by any state, except such number only, as shall be deemed necessary by the United States in congress assembled, for the defence of such state, or its trade; nor shall any state engage in any war, without their consent, unless invaded by enemies, or certainly advised of an intended invasion by Indians; nor grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war, by the United States in congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, unless infested by pirates, and then only until the United States in congress assembled, shall determine otherwise." Besides, "all disputes and differences concerning *any cause whatever*, are determinable by courts to be established under the authority of congress."

Let us now inquire, whether the present case is such a cause of prize as is mentioned in the many cases quoted by the counsel for the respondent. In what circumstances, is any of those cases like this? Does it appear from any of them, that the prize court in England would decide such a case as this is? Does it appear, that the courts of Westminster Hall, in any action for such a trespass as this, would refuse to take cognisance, because the original taking was a capture as prize? Does it appear, that they would refuse to take cognisance, under color that the second taking was a

capture as prize? If they should, ought any such decision to have weight with us, in this case? What are the cases quoted? A justification by persons of original captures made by themselves, because made as prize. What is this case? A justification of their conduct, after a capture made in battle, by others, in their sight, under pretence of right, founded on that circumstance. If they say, the second taking was an original capture as prize, their assertion is falsified by their own proofs, that *they* saw the capture made by others, the day before. If they say, their proceedings were united with the original capture as prize, by being *in sight* at the time, let them take care that their pretension of right is well founded. Comb. 367. If it is not, their proceedings are distinct from the original capture, and they are plainly trespassers, and must abide by the consequences. We are clearly of opinion, that their pretension of right is utterly unfounded, and that the whole conduct of the commanders and crews of the brigs, was cruel, unprovoked, wanton and *malâ fide*. In this very singular and extraordinary case, they have exerted themselves to disable the respondent from proving the capture to be prize; *and is the sole question, afterwards, [*104 to be, *prize or not?* What necessity is there for determining whether the Betsey was prize or not? Is it not evident from the case of *Combs* v. *The Hundred of Bradley*, in 2 Salk. 613; and of *Goss and another* v. *Withers*, 2 Burr. 83; and many other cases, that an action will lie, on possession by the plaintiff? And with what peculiar force does the reason apply in this case, for the action being maintained merely on the possession? This court and the court of admiralty are competent, not only to direct proceedings, but to ascertain facts, judge of them, and the law upon them, and assess damages, as justice may require. As to the notion of mistake excusing, it is a *petitio principii*. The mistake does not appear—the crime does. So far from behaving as partners in the capture, with the Argo, the commanders of the three brigs, who saw the surrender to her, chase her off; send the Betsey as prize to themselves only, for a port distant from the home of the captors, and in the eye of the wind, though in a part of the sea where she was particularly exposed to dangers from the enemy, with orders to avoid certain ports for fear of the Argo's falling in with her. In fact, it was not a real, but a pretended capture, as prize, by them. Are we then bound, in such a case, to call it a cause of prize, because the original taking was a capture as prize? Or, are we to refuse to call it a trespass, though the second taking was not a capture as prize?

How far soever the learned judges in England have carried the justification of captures, from the circumstance of their being made as prize, yet they never have carried it so far as this case extends. That they have gone a great way is evident. In the cited case of *Vanderwoodst and others* v. *Thompson* (2 Doug. 609), the defendant, in an action of trespass, having a letter of marque, took a vessel that made some resistance, and carried her to Newcastle, where she was seized by the custom-house officers, for having smuggled goods on board; and she was afterwards condemned in the Exchequer. It was contended for the plaintiff, that the capture was unlawful, because the defendant did not belong to the custom-house, and he could not justify the seizure under the hovering act of 6 *Geo. I., c.* 11, as king's ships only can seize under such circumstances. It was held, "as there was reason to suppose that the ship was a pirate, though the jury should be satisfied she

was not really so, yet the action would not lie." Afterwards, "there was a motion for a new trial, which, upon consideration, was denied by the court." If that cause *was* cognisable in the prize court, and if that court determines solely by the law of nations and treaties, as is laid down by the judges, how were other nations interested in the principle of such a decision? If it was not cognisable in the prize court, how can it be applied to the present case, in favor of the respondent?

To proceed: If the courts of Westminster Hall, in an action for such a trespass as this, should refuse to take cognisance, because the original *105] taking was a capture as prize, or under color that the *second taking was a capture as prize, ought any such decision to have weight with us in this case? It ought not. Such a decision must turn entirely upon the municipal law of England. It must be founded upon this principle, governing in the cases cited by the counsel for the respondent; "that, of a seizure as prize, the common law does not take notice as a trespass." *Le Caux* v. *Eden* (2 Doug. 572). Admit the principle. It applies not. This is not a common-law court. The act of assembly establishing this court, makes it "a court of appeals from definitive sentences or decrees of the admiralty." We are, therefore, a court of admiralty. "If the sentence of the court of admiralty is thought to be erroneous, there is, in every maritime country, a superior court of review, &c., to which the parties who think themselves aggrieved, may appeal; and this superior court judges by the same rule which governs the court of admiralty, viz., the law of nations and treaties. This manner of trial and adjudication is supported, alluded to, and enforced by many treaties." Answer of the British court, &c. We are a court of admiralty, competent to judge by that rule. The act of assembly establishing admiralty jurisdiction in this state, declares, that the court shall be governed by "the law of nations." Whatever in the law of nations relates to a court of admiralty, relates to this court, because no treaty has diverted the application. Answer of the British court, &c.; Vattel, b. 2, ch. 7; 3 Bl. Com., 69.

Much has been said of a distinction, in England, between the instance court and the prize court, though the powers of both are exercised by the same person; and it is urged, that only the latter judges by the law of nations and treaties. We are told, "it is no more like a court of admiralty, than it is to any court of Westminster Hall; that the manner of proceeding is totally different; that the appeal is different—to delegates, from the admiralty—to commissioners consisting of privy counsellors, from the court of prize. That to constitute the authority of the prize court, or to call it forth, in every war, a commission under the great seal issues, &c."(*a*) Such a distinction may prevail in England, but is it known or regarded in other nations? The words "to call it forth," are material. It seems only a solemn, official notification to the admiralty, that there is a war, and that it may proceed accordingly, as a declaration of war is a notification to the people in general. But this declaration does not make the war, in the one case; nor, perhaps, does the commission constitute the authority, in the other. It is confessed, "that the most ancient instrument shows a prize jurisdiction, either inherent

(*a*) Lord Mansfield, delivering the resolution of the court, in the case of Lindo *v.* Rodney and another, 2 Doug. 618.

or by commission in the admiral. It is a letter from *Edward III.* to the King of Portugal." And "that since the reign of Queen Elizabeth, the judge of the admiralty, either by virtue of an inherent power, or the king's commission, *or both, has solely exercised the jurisdiction of prize— [*106 and that so far back as particular cases can be traced, which is for a century, the admiralty has judged of, and condemned goods taken on land, as prize, as well as goods taken on sea." Lord Mansfield, delivering the resolution of the court, in the case of *Lindo* v. *Rodney and another.*(*a*)

What do treaties, ancient and modern, stipulate for, in order to guard against violences on the seas? A trial in the court of admiralty, as soon as possible, before the effects taken are in any manner to be disposed of. Why? because, by the maritime law of nations, that court judges by the law of nations and treaties. Sir George Lee, Doctor Paul, Sir Dudley Ryder and Mr. Murray, now Lord Mansfield, in their report, which forms the principal part of the answer of the British court, and is so celebrated, by Messrs. Montesquieu and Vattel,(*b*) say, "By the maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be, or be not, lawful prize. Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon, as prize, in a court of admiralty, judging by the law of nations and treaties. The proper and regular court for these condemnations, is the court of that state to whom the captor belongs."

Are we, then, because in England they call the admiralty court a prize court, when it acts in a cause of prize, and it then proceeds in a different manner, with an appeal to commissioners of the privy council, to reject the "universal and immemorial" compact of mankind? There was a time, when we listened to the language of her senates and her courts, with a partiality of veneration, as to oracles. It is past—we have assumed our station among the powers of the earth, and must attend to the voice of nations—the sentiments of the society into which we have entered.

Lord Mansfield, in the cause of *Lindo* v. *Rodney and another*, said, "The end of a prize court is to suspend the property till condemnation; to punish every sort of misbehavior in the captors; to restore instantly, *velis levatis*, if, upon the most summary examination, there does not appear a sufficient ground; to condemn finally (if the goods really are prize) against everybody, giving everybody a fair opportunity of being heard: A captor may, and must force every person interested, to defend; and every person interested, may force him to proceed to condemn without delay. These views cannot be answered in any court of Westminister Hall, and therefore, *the courts of Westminster Hall never have attempted to take cognis- [*107 ance of the question—prize or no prize; not from the locality of being done at sea, but from their incompetence to embrace the whole of the subject."

(*a*) The very great antiquity of the Court of Admiralty in England, and the extent of its jurisdiction, may be known from the learned Selden's notes on Fortescue de Laudibus p. 67; Zouch 44, &c.; Godolph. p. 22, &c. Though the authority of this court, with respect to matters in which *foreign nations* may be concerned, and particularly to captures *jure belli*, is treated of, yet no distinction is made by these authors as to the Court of Admiralty and the Court of Prize.

(*b*) Montesquieu's Letters, 5 March 1753; Vattel, b. 2, ch. 7, § 84; 3 Bl. Com. 70.

"These views are answered" here in the court of admiralty, and with as good cautions as in England; and as far as a court of appeals is concerned, they can be answered in this court as fully as in a court of appeals to commissioners there.

It seems proper here, to take notice of the objection against the authority of this court, founded on the words of the law by which it was established, prior to the completion and final ratification of the confederation. It is constituted "a court of appeals for reviewing, re-considering, and correcting, the definitive sentences and decrees of the court of admiralty, other than in cases of capture upon the water, in time of war, from the enemies of the United States, &c."

The construction of these words depends upon the resolutions of congress, the confederation, and the law by which the admiralty jurisdiction is established, taken together. If the principles of our preceding construction are right, they apply as aptly here, and the appeal is regular. If it is not, there will be a defect of justice. The legislature intended to give this court an authority to receive all appeals from the judge of admiralty, where they were not resigned to a continental court of appeals. This was not resigned. It, therefore, belongs to this court. We will endeavor to promote justice, according to the intentions of the commonwealth, conveyed in the laws; and not demit any part of her sovereignty, unless we are convinced beyond a doubt, that it is our duty to do so.

We now return to the last of the secondary questions. Did the court of admiralty take cognisance *as a prize court?* In considering this question, a very strict attention must be had to the *proceedings* of the court of admiralty in this case. That court was also erected by an act of assembly, prior to the completion and final ratification of the confederation. It is, to be sure, a court of prize, and an instance court, if that mode of expression be preferred; or, in other words, the judge who has but one commission, may try causes of prize, and other matters of admiralty jurisdiction. There is a difference in his proceedings for condemnation in causes of prize, and those in other cases. His style by law is, "judge of the admiralty." The reasonable and legal meaning of the 3d, 4th and 6th sections of the law under which he acts, is, that in trying a cause of prize, the vessel or goods taken, must be within his jurisdiction, precinct and power. They are these—"That in cases of prize, capture or re-capture upon the water, from enemies, or by way or reprisal, or from pirates, the same shall be tried, adjudged and determined, as well as to the question whether prize or not, as to the claims of the parties interested or pretending to be interested in the same, by the law of nations and the acts and ordinances of congress, *before the said judge, by witnesses, according to the course of the civil law:" and—"That the captain or commander of any ship or vessel of war, or prize-master, or other person, having charge of any capture or re-capture, or other property seised upon the water as aforesaid, who shall conduct or bring the same into port, shall immediately deliver the same, without diminution, to the marshal of the said court of admiralty."

*108]

The law then goes on to direct the mode of proceeding to the condemnation, ordering, "That the judge shall cause notice to be published immediately, in some newspaper, of the day appointed for the trial of *such prize*, inserting therein the name, size or burthen, and other description

of the said vessel, so taken and brought into port, the name and surname of the master, the place she last sailed from, the port for which destined, and in case of a re-capture, by what ship or vessel taken, to the end that all persons concerned may appear and show cause, if any there be, wherefore such capture, or re-capture, goods, merchandise, or other property, should not be condemned and adjudged to the libellants."

Does the present case in any manner resemble the "cases of prize" described in this law? Where are "claimants interested or pretending to be interested?" Claimants are voluntary applicants for justice. Shall trespassers, compelled to answer for their wrong, cover themselves with that character? Can there be "claimants," but in a proceeding *in rem?* How would the publication before mentioned suit such claimants as the appellants? Were the proceedings of the judge in this case, such as he constantly has observed in cases of prize? They were not. Application was made to him for *damages.* He proceeded in that line. Here is neither libel nor process against the capture—no monition—"no notice" under the act of assembly.

What could give the judge of the admiralty for *this state,* jurisdiction to proceed as a court of prize, upon a capture contested between citizens of different states, which is the case here, rather than any court of admiralty in any other state, when the property captured was not within the power of his jurisdiction? Because, it is said, some of the offending captains and their vessels came into this port. Does the jurisdiction of a court of prize depends on certain offenders, with respect to the capture coming into a port? Where are the authorities of law, to show that *this* circumstance can give such jurisdiction, or, that there can be an institution of a cause of prize, according to the maritime law of nations, for damages only? The authorities cited, that were thought most apposite, and were most relied on by the counsel for the respondent, were those of *Brown and Burton* against *Franklin,* the King's Proctor (Carth. 474); and of the *King* v. *Broom.* But they are not in any manner applicable. In the first, the plaintiffs, masters of two vessels, but having no regular letters of marque, took a French ship, cargo and money, upon land, in the East Indies—they being English subjects—it was held, that they acquired no right by this capture, but that it was a perquisite *of the admiralty. The King's Proctor, upon the usual monition, got a sentence of condemnation for the whole, [*109 in order to make them account. In brief, they had effects *in their hands,* which by the maritime law of England, belonged to the king or his admiralty, and they were obliged to account for them, *according to that law.* 12 Mod. 125. Lord Mansfield calls it a proceeding *in rem; Le Caux* v. *Eden,* in the notes. The second case was of the same kind, and was decided on the same principles. It was further said by the counsel for the respondent, that the court of admiralty, that *first* proceeds in such a case as the present, acquires an exclusive right of deciding upon it, in the same manner as the nation that first commences a judicial process against pirates, may pronounce sentence against them. To say no more on this comparison, it is sufficient to observe, that such a right may be attributed to the atrocity of the guilt, as the offenders are *hostes humani generis*

If the coming of trespassers, or of the vessels in which they trespassed upon the high seas, within the power of a judge's jurisdiction, authorizes

him to proceed against them, to what confusion may it lead? A capture is made from an enemy; afterwards friends trespass against the prize, and arrive in different ports, the fate of the prize being unknown. They are prosecuted in one or more courts of admiralty. The prize at length arrives in a different port, and is libelled in a different court of admiralty, for condemnation in the usual manner. What contests for jurisdiction must ensue? "Quod inconveniens est, non licitum est."

We are unanimously of opinion, that the judge of the admiralty for this state, had jurisdiction in this cause, and that the appeal to us is regular. We decree, that the respondent recover and have of the appellants, 1141*l.* 5*s.* 4*d.*, with costs, except those in this court, of which each party is to pay a moiety. (a)

Mr. President SHIPPEN delivered an opinion upon the second point made in the cause, which has never been published, and may be acceptable to the profession. It is therefore subjoined:

SHIPPEN, President.—There is one matter which I beg leave to mention, in addition to what the president has advanced, as it is an argument founded on the proceedings of the court of admiralty, with which I formerly had occasion to be a little acquainted, and as in my opinion, it has considerable weight in the determination of this question.

It has been frequently mentioned, that the court of admiralty below has two different and distinct jurisdictions one as an ordinary court of admiralty, called the instance court, the other as a prize court. "The manner of proceeding in the two courts," as Lord Mansfield says, "is totally different." It is material, therefore, to consider on which side of this court, or rather in which court, this suit has been originally instituted: because it appears to me that the meaning of the consideration and acts of assembly, constituting the courts of appeals, was that the appeals from the prize court should be to the congress courts; those from the instance court, to this court. On this state of the matter, two questions seem to arise: 1st, Could this suit be instituted in the prize court? 2d, Has it been instituted there? To the first question, his excellency has spoken so fully, that I shall add nothing to it. [illegible] to the second question I have a few words to offer, viz supposing this cause could have been instituted there, has it been done? [illegible] there it will be necessary to examine the usual course of proceedings in [illegible] In the instance courts, we have considerable lights in a book [illegible] Curiæ Admiralitatis; the pro- [illegible] to the ordinary jurisdiction of the [illegible] mentioned in it. It appears there, that

---

[illegible] Penhallow's administrator *v.* Penhallow, 2 [illegible] Henry, *ante*, p. 49; Jen- [illegible] William, Id. 12; Brevoor *v.* The [illegible] 19; Commonwealth *v.* Smith, [illegible] Hollingsworth *v.* The Betsey, [illegible] Taylor, Hopkinson's Adm. Cases [illegible] Shandy, Id. 84.

(a) 262, it was held, that the owners [illegible] damages to the persons injured, for [illegible] and crew.

the first process is against the person of the defendant, to compel *an appearance*, in a cause civil and maritime, in the same way that a *common-law* process issues. But if the person cannot be arrested, then follows another mode of proceeding, against the property of the defendant, his ship or goods, which, when attached by the marshal, are to remain in the power of the court, to answer the judgment of the court. This proceeding against the effects, however, is justified only where the defendant is out of the kingdom, or so absconds that he cannot be arrested—except in such cases where the ship itself is made answerable by law.

What is the precedent in the prize court? Lord Mansfield says "it is peculiar to itself, and no more like that of the instance court of admiralty than it is to any court in Westminster Hall." It will be found invariably to be a proceeding *in rem*, against the captured ship and goods.

"The end of the prize court (says he) is to suspend the property till condemnation, to punish every sort of misbehavior in the captors; to restore instantly, *velis levatis*, if, upon the most summary examination, there does not appear a sufficient ground; to condemn finally, if the goods are really prize, against everybody, giving every person a fair opportunity of being heard." All this speaks the language of a proceeding solely *in rem*. And it will be found, that there is no instance of a suit being commenced in the prize court, but what had the condemnation or acquittal of the ship as its object, or was a suit, by way of supplemental libel, founded upon the previous proceeding had against the captured ship or goods, as prize.

Look at the case of the *King* v. *Broom*, and that of the *King's Proctor* v. *Brown and Burton*. In both cases, the suits were to oblige the defendants to account for the value of the ship and goods taken as prize. How was the proceeding in the prize court? *first*, to exhibit libels against the vessel and goods captured, and condemn them as lawful prize to the king, *then* to file supplemental libels against the defendants, to bring them to account for the value. In both cases, the vessel and goods themselves were out of the power of the court who condemned, one having been sold in Barbadoes, and the money converted to the defendant's use, in the other, the ship was stranded in the East Indies. Yet, to give the prize court jurisdiction, so as to enable them to enforce their decrees against the defendants, it appeared necessary to proceed in the first instance to condemn as prize.

Look at all the cases cited in Douglas, in the cause of *Le Caux* v. *Eden*, it will be found that in every one of them (except one, which was a case of piracy and not prize), proceedings had been previously had against the captured vessels, which gave the prize court full and exclusive jurisdiction, as to all the consequences.

In what manner was the present suit commenced and carried on in the court of admiralty? Not by libelling the brig Betsey as prize, and then calling the defendants to account for wresting her out of the hands of the captors, which would have been the mode of proceeding in the prize court, but by issuing process against the defendants and two of their vessels, in the usual and ordinary mode of proceeding in the instance court of admiralty. It is not material to the present purpose, to consider whether the former mode was practicable or convenient; suffice it to say, it has not been adopted, and therefore, the suit was not instituted in the prize court.

It must be acknowledged, that this cause carries strong marks of being a

him to proceed against them, to what confusion may it lead? A capture is made from an enemy; afterwards friends trespass against the prize, and arrive in different ports, the fate of the prize being unknown. They are prosecuted in one or more courts of admiralty. The prize at length arrives in a different port, and is libelled in a different court of admiralty, for condemnation in the usual manner. What contests for jurisdiction must ensue? "*Quod inconveniens est, non licitum est.*"

We are unanimously of opinion, that the judge of the admiralty for this state, had jurisdiction in this cause, and that the appeal to us is regular. We decree, that the respondent recover and have of the appellants, 1141*l.* 5*s.* 4*d.*, with costs, except those in this court, of which each party is to pay a moiety. (*a*)

Mr. President SHIPPEN delivered an opinion upon the second point made in the case, which has never been published, and may be acceptable to the profession. It is therefore subjoined:

SHIPPEN, President.—There is one matter which I beg leave to mention, in addition to what the president has advanced, as it is an argument founded on the proceedings of the court of admiralty, with which I formerly had occasion to be a little acquainted, and as, in my opinion, it has considerable weight in the determination of this question.

It has been frequently mentioned, that the court of admiralty below has two different and distinct jurisdictions, one as an ordinary court of admiralty, called the instance court, the other as a prize court. "The manner of proceeding in the two courts," as Lord Mansfield says, "is totally different."

It is material, therefore, to consider on which side of this court, or rather in which *court*, this suit has been originally instituted: because it appears to me, that the meaning of the confederation and acts of assembly, constituting the courts of appeal, was, that the appeals from the prize court should be to the congress court, those from the instance court, to this court.

On this state of the matter, two questions seem to arise: 1st, Could this suit be instituted in the prize court? 2d, Has it been instituted there?

To the first question, his excellency has spoken so fully, that I shall add nothing to it. But to the second question I have a few words to offer, viz. —Supposing this cause could have been instituted there, has it been done?

Here it will be necessary to examine the usual course of proceedings in the two courts. In the instance court, we have considerable lights in a book known to every lawyer, called Clerke's Praxis Curiæ Admiralitatis; the proceedings stated in that book do all relate to the ordinary jurisdiction of the admiralty, and there is no prize case mentioned in it. It appears there, that

---

(*a*) See Purviance *v.* Angus, *post*, p. 180; Doane's administrator *v.* Penhallow, 2 Dall. 160, 174; s. c. 3 Id. 54. See also Montgomery *v.* Henry, *ante*, p. 49; Jennings *v.* Carson, 1 Peters' Adm. 8; Findley *v.* The William, Id. 12; Brevoor *v.* The Fair American, Id. 92; United States *v.* Bright, Bright. R. 19; Commonwealth *v.* Smith, 7 Sm. L. 696; Moxon *v.* The Fanny, 2 Peters' Adm. 309; Hollingsworth *v.* The Betsey, Id. 330. W. B. *v.* Latimer, 4 Dall. app'x 1; Rice *v.* Taylor, Hopkinson's Adm. Cases 16; Pray *v.* The Recovery, Id. 47; Cassin *v.* The Tristram Shandy, Id. 84.

In Dias *v.* The Owners of the Revenge, 3 W. C. C. 262, it was held, that the owners of a commissioned privateer were not liable in damages to the persons injured, for acts of *piracy* committed by the officers and crew.

the first process is against the person of the defendant, to compel *an appearance*, in a cause civil and maritime, in the same way that a *common-law* process issues. But if the person cannot be arrested, then follows another mode of proceeding, against the property of the defendant, his ship or goods, which, when attached by the marshal, are to remain in the power of the court, to answer the judgment of the court. This proceeding against the effects, however, is justified only where the defendant is out of the kingdom, or so absconds that he cannot be arrested—except in such cases where the ship itself is made answerable by law.

What is the precedent in the prize court? Lord Mansfield says "it is peculiar to itself, and no more like that of the instance court of admiralty than it is to any court in Westminster Hall." It will be found invariably to be a proceeding *in rem*, against the captured ship and goods.

"The end of the prize court (says he) is to suspend the property till condemnation, to punish every sort of misbehavior in the captors; to restore instantly, *velis levatis*, if, upon the most summary examination, there does not appear a sufficient ground; to condemn finally, if the goods are really prize, against everybody, giving every person a fair opportunity of being heard." All this speaks the language of a proceeding solely *in rem*. And it will be found, that there is no instance of a suit being commenced in the prize court, but what had the condemnation or acquittal of the ship as its object, or was a suit, by way of supplemental libel, founded upon the previous proceeding had against the captured ship or goods, as prize.

Look at the case of the *King* v. *Broom*, and that of the *King's Proctor* v. *Brown and Burton*. In both cases, the suits were to oblige the defendants to account for the value of the ship and goods taken as prize. How was the proceeding in the prize court? *first*, to exhibit libels against the vessel and goods captured, and condemn them as lawful prize to the king, *then* to file supplemental libels against the defendants, to bring them to account for the value. In both cases, the vessel and goods themselves were out of the power of the court who condemned, one having been sold in Barbadoes, and the money converted to the defendant's use, in the other, the ship was stranded in the East Indies. Yet, to give the prize court jurisdiction, so as to enable them to enforce their decrees against the defendants, it appeared necessary to proceed in the first instance to condemn as prize.

Look at all the cases cited in Douglas, in the cause of *Le Caux* v. *Eden*, it will be found that in every one of them (except one, which was a case of piracy and not prize), proceedings had been previously had against the captured vessels, which gave the prize court full and exclusive jurisdiction, as to all the consequences.

In what manner was the present suit commenced and carried on in the court of admiralty? Not by libelling the brig Betsey as prize, and then calling the defendants to account for wresting her out of the hands of the captors, which would have been the mode of proceeding in the prize court, but by issuing process against the defendants and two of their vessels, in the usual and ordinary mode of proceeding in the instance court of admiralty. It is not material to the present purpose, to consider whether the former mode was practicable or convenient; suffice it to say, it has not been adopted, and therefore, the suit was not instituted in the prize court.

It must be acknowledged, that this cause carries strong marks of being a

prize cause. But it should be observed, that in the case cited by the counsel, the prize court of admiralty had possession of the original cause, and were competent to give redress as to all the consequences. But if we will suppose a case, where the prize court cannot, consistently with its institution or forms, take possession of a cause, and it is brought in the ordinary court of admiralty or in a common-law court, if they cannot decide upon it, because a matter of prize arises incidentally in it, there may be a manifest defect of justice, and perhaps in the present case, Captain Talbot would have no redress for the injury he has sustained.

COURT OF OYER AND TERMINER,

AT PHILADELPHIA.

OCTOBER SESSIONS, 1784.

RESPUBLICA *v.* KEATING.

Witness.

On an indictment for forging a promissory note, the supposed indorser is competent to prove the forgery.

LUKE KEATING was indicted for forging a promissory note, payable to John Meng, with a forged indorsement of John Meng & Co.

Lewis, for the defendant, objected to the admission of Meng's testimony; contending, that if Meng could prove that the note was false, it would discharge him from the payment; and if he proved it to be a genuine note, his evidence might be given against him, in a civil action founded upon the note; in either event, he was an interested witness, and, consequently, an incompetent one. Salk. 283; Hardr. 331; 2 Hawk. 433; Str. 728, 1043, 1104.

Ingersoll (who prosecuted on this occasion for the *Attorney-General*) argued, that, to prevent an interruption and failure of justice, and the escape of offenders, the injured person was, in all cases of indictment, a competent witness. Vent. 49, 78; Vin., tit. Evid., pl. 26; 2 Str. 1229, and *Abrahams* v. *Bunn*, 4 Burr. 2252, establish this doctrine. He insisted, that the evidence given by Meng, on the present trial, could not affect him in a civil action; and observed, that if anything relative to the civil action should decide the case before the court, the probability was, that Meng's testimony would be favorable to the prisoner; for if Meng swears the note to be false, he can gain nothing; but if he proves it to be true, he testifies against his own interest.

Lewis, in reply, acknowledged that the evidence given on this trial, could not be offered in favor of Meng on another; but he urged, that if the note itself were proved to be forged, it might be detained by the court, and not suffered afterwards to be sued; on *the same principle, that it is said in 6 Co. 45, "the court will damn a bond, on which the obligee has recovered." [*111

Respublica v. De Longchamps.

McKean, Chief Justice.—The court will not detain a note or bond in the circumstances mentioned. With respect to the competency of the witness, I remember a case before Chew, Chief Justice, where one Chapman was indicted for playing with false dice, and the person cheated was admitted to be a witness. On the authority of that decision, in a recent trial at Lancaster, the injured party was allowed to give evidence, after a full argument upon the present objection. We have, therefore, no doubt that Meng is a competent witness.(*a*)

Respublica *v.* De Longchamps.

International law.

A secretary of legation is entitled to all the immunities of a minister.
The law of nations forms part of the municipal law of Pennsylvania.
Punishments must be certain and definite. One who has assaulted a foreign minister cannot be sentenced to imprisonment, until the foreign sovereign shall declare the reparation satisfactory.

Charles Julian de Longchamps, commonly called the *Chevalier de Longchamps*, was indicted, that "he, on the 17th of May 1784, in the dwelling-house of his excellency the French minister plenipotentiary, in the presence of Francis Barbe Marbois, unlawfully and insolently did threaten and menace bodily harm and violence to the person of the said Francis Barbe Marbois, he being consul-general of France to the United States, consul for the state of Pennsylvania, secretary of the French legation, &c., resident in the house aforesaid, and under the protection of the law of nations and this commonwealth." And that, "afterwards, to wit, on the 19th of May, in the public street, &c., he, the said Charles Julian de Longchamps, unlawfully, premeditatedly and violently, in and upon the person of the said Francis Barbe Marbois, under the protection of the laws of nations, and in the peace of this commonwealth, then and there being, an assault did make, and him, the said Francis Barbe Marbois, unlawfully and violently did strike and otherwise, &c., in violation of the laws of nations, against the peace and dignity of the United States and of the commonwealth of Pennsylvania." To these charges, the defendent pleaded not guilty.

The evidence in support of the first count, was, that on the 17th of May, de Longchamps went to the house of the minister of France, and after some conversation with Monsieur Marbois, was heard to exclaim in a loud and menacing tone, "*Je vous deshonnerera, policon, coquin,*" addressing

---

(*a*) The case of The King *v.* Chapman, cited by C. J. McKean in the text, is also stated in Respublica *v.* Ross, 2 Yeates 4, as follows: "In Rex *v.* Bates & Chapman, on indictment for a cheat in playing with false dice, and tried in the Mayor's Court, July sessions 1772 (before Chew, Recorder), Henry Barnhold, the person defrauded, was admitted a witness, after long argument. A copy of the report of the case, taken by Allen, then attorney-general, was read by the counsel." In Respublica *v.* Ross (also reported in 2 Dall, 239), which was an indictment for forging a promissory note, the alleged drawer, Joseph Heister, was held to be competent to prove that his signature was forged. The same point was ruled in Pennsylvania *v.* Farrel, Addis. 246. But in Respublica *v.* Ross, it was held, that the indorser, who admitted his signature to be good, was not competent to impeach the validity of the note, until he had paid or satisfied the holder. So, on an indictment for uttering a forged indenture, the party injured was ruled to be a competent witness. Respublica *v.* Wright, 1 Yeates 401.

himself to that gentleman. That the noise being heard by the minister, he repaired to the room from which it issued, and that, in his presence, the defendant repeated the insult to Monsieur Marbois, in nearly the same terms.

In support of the second count, it appeared, that de Longchamps and Monsieur Marbois, having met in Market street, near the coffee-house, entered into a long conversation, in the course of which, the latter said, that he would complain to the civil authority, and the former replied, "you are a blackguard." The witnesses generally deposed, that de Longchamps struck the cane of Monsieur Marbois, * before that gentleman used any violent gestures, or even appeared incensed; but that as soon as the stroke was given, Monsieur Marbois employed his stick with great severity, until the spectators interfered and separated the parties. One of the witnesses, indeed, said, that previously to engaging with their canes, he observed the two gentlemen, at the same instant, lay their hands on each other's shoulders, in a manner so gentle, that he, who had heard it was customary among the French to part with mutual salutations, imagined a ceremony of that kind was about to take place, and was surprised to see de Longchamps step back, and strike the cane of Monsieur Marbois. [*112

On the part of the defendant, evidence was produced of his having served with honor in the French armies, and his commission of sub-brigadier in the dragoons of Noailles, was read. It appeared, that the occasion of his calling on Monsieur Marbois, was to obtain authentications of these, and some other papers relative to his family, his rank in France, and his military promotions, in order to refute several publications, which had been made in the newspapers, injurious to his character and pretensions. The refusal of Monsieur Marbois to grant the authentications required, was the ground of de Longchamps' resentment, and the immediate cause of his menaces at the minister's house.

With respect to the assault, one witness (a Frenchman) swore that he saw Monsieur Marbois give the first blow, and his excellency, the President of the state, testified, that Monsieur Marbois, having complained to him of the insult received in the minister's house, he sent a message to de Longchamps, requesting to see him; that the defendant readily attended, when his excellency explained his reasons for apprehending that he meditated some personal violence upon Monsieur Marbois, and requested him to pledge his parol of honor, that he would prosecute the matter no further. This he declined, in polite but positive terms; when his excellency proposed to Monsieur Marbois that the Chevalier should be bound over for his good behavior; but that gentleman would not accede to the proposal.

Sergeant and *Vannost*, for the defendant, contended, that the expressions laid in the first part of the indictment, were too equivocal to be construed into menaces of corporal harm. "I will dishonor you," is a sentence that conveys more than one signification; and the threat would have been fully accomplished, had the Chevalier descended to any of those very libellous publications, with which his own character had been aspersed. The established maxim, that words ought to be taken in their mildest sense, operates, therefore, in favor of the defendant; and, at all events, that they do not amount to an assault, and are not the subject of an indictment, are principles incontrovertibly established. 3 Bl. Com. 20; Finch L. 202; 4 Inst. 108. They

insisted, that the president offered Monsieur Marbois the only security which the law will allow on such occasions, and which would effectually have restrained any future violence intended *to be committed on his person. That, therefore, his having suffered a second insult, must be imputed to his refusal to accept that security.

*113]

It is pretended, that by the menaces at the house of the minister, the law of nations was violated; yet, it must be remembered, that the reparation sought, and the remedy offered, are confined to the municipal law of Pennsylvania, where the offence was committed; and, in all cases of menaces, the law of Pennsylvania yields no further relief, than the imposition of a legal restraint on the execution of those menaces. The degree of outrage is, likewise, to be computed by the quality of the person offended; and as the application of the defendant was to procure a certificate from the Consul of France, if Monsieur Marbois has been at all insulted, it is only in that character, which is not protected by the law of nations; Vatt. lib. 4, § 75; and, consequently, there is no redress, but what the law of the state provides.

On the second count of the indictment, they argued, that it was not sufficiently proved, that de Longchamps was the aggressor. One witness has sworn positively, that the first blow was given by Monsieur Marbois, and another describes the parties to have laid their hands on each other, at the same instant. Though other witnesses did not see these circumstances, yet they are grounded upon affirmative testimony, which cannot be destroyed by that which is merely negative. Gilb. L. Ev. 157. If, therefore, the evidence for the defendant was entitled to credit, it appeared, that Monsieur Marbois was the author of the outrage; and, it is so well established, that no elevation, rank or immunity of character, can abrogate the right of self-defence, that if a sovereign minister offend a citizen, the latter may oppose him, without departing from the respect due to his station, and give him a lesson that shall both efface the stain and expose the author of the outrage. Vatt. lib. 4. § 80.

The *Attorney-General*, assisted by *Wilson*, supported the prosecution. The necessity of sustaining the law of nations, of protecting and securing the persons and privileges of ambassadors; the connection between the law of nations and the municipal law, and the effect which the decision of this case must have upon the honor of Pennsylvania, and the safety of her citizens abroad, were stated at length from 3 Burr. 1480; 1 Bl. Com. 253; 4 Id. 70; Vatt. pref. 6, page 203; Id., lib. 1, § 6; lib. 4, § 84, § 80. Ayliff's Pandect, lib. 2, 132.

On the first part of the indictment, they observed, that the meaning of the menace used in the minister's house, was to be sought for in the opinion of the French nation. With them, the phrase extended further than colloquial dishonor (that, Monsieur Marbois had already suffered), it implied personal violence. This was the idea, likewise, of his excellency the President of the State, and the event confirms it, beyond a doubt. If, therefore, the menace had been attended with its natural effect, impressing Monsieur Marbois with an apprehension for his own safety, the consul-general of France, *and the secretary of the French legation to the United States, must have been prevented from paying a proper attention to his

*114]

appointments, which is certainly a violation of the law of nations. Vatt. lib. 2, § 218. Upon the same principle, that the infringement of a statute is an indictable offence, though the mode of punishment is not pointed out in the act itself, an offence against the laws of nations, while they compose a part of the law of the land, must necessarily be indictable.

With respect to the assault, they contended, that the weight of the testimony proved de Longchamps to be the aggressor; and the respective characters of the parties tend to confirm it; Monsieur Marbois preserved, during the whole transaction, his constitutional temperament—cool, deliberate and self-possessed; while de Longchamps, naturally captious and impetuous, became incensed at the imaginary injuries he had received, and, by his own declaration, was determined to be revenged.

The Chief Justice, after minutely recapitulating the evidence, and applying it to the charges in the indictment, expressed the following sentiments:—

McKean, Chief Justice.—This is a case of the first impression in the United States. It must be determined on the principles of the laws of nations, which form a part of the municipal law of Pennsylvania; and, if the offences charged in the indictment have been committed, there can be no doubt, that those laws have been violated. The words used in the minister's house (which is to be considered as a foreign domicil, where the minister resides in full representation of his sovereign, and where the laws of the state do not extend), may be compared to the same words applied to the judges, in a court of justice, where they sit in representation of the majesty of the people of Pennsylvania. In that case, the offender would be immediately committed to jail, without the preliminary process of an indictment by a grand jury; and, in the case before us, if the offender is convicted, he may certainly be punished by fine and imprisonment.

In actions of slander, words were formerly construed in the mildest sense they would admit; but reason has superseded such forced interpretations, and words are now to be taken according to their ordinary import and meaning. Those expressed by the defendant, are evidently of a tendency so opprobrious and violent, that they cannot fail to aggravate the outrage which has been committed.

As to the assault, this is, perhaps, one of that kind, in which the insult is more to be considered, than the actual damage; for, though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of assault and battery, and among gentlemen, too often, induce duelling, and terminate in murder. As, therefore, anything attached to the person, partakes of its inviolability, de Longchamps' striking Monsieur Marbois' cane, is a sufficient justification of that gentleman's subsequent conduct.

*Bryan, Justice.—The distinction between a consul and a member of the legation, is not warranted in this case; for Monsieur Marbois never ceased to be the latter. As secretary to the legation, his authority descends from a high source, his commission being made out in the same form as the minister's, and signed in the same manner, by the king his master. [*115

The jury, at first, found the defendant guilty of the assault only; but, the court desiring them to reconsider the matter, they returned with a verdict against him on both counts.

The sentence of the court was suspended, in consequence of a case stated by his Excellency the President, and the Honorable Supreme Executive Council, for the opinion of the judges. It was argued in open court, on the 10th and 12th of July, by five counsel, two for the affirmative, and three for the negative; and on the 7th of October, the prisoner being brought before the court, the Chief Justice stated the case, repeated the answers of the judges, and finally, pronounced the judgment of the court, in the following manner.

McKean, Chief Justice.—Charles Julian de Longchamps: You have been indicted for unlawfully and violently threatening and menacing bodily harm and violence to the person of the Honorable Francis Barbe de Marbois, secretary to the legation from France, and consul-general of France to the United States of America, in the mansion-house of the minister plenipotentiary of France; and for an assault and battery committed upon the said secretary and consul, in a public street in the city of Philadelphia. To this indictment, you have pleaded, that you were not guilty, and for a trial put yourself upon the country; an unbiassed jury, upon a fair trial, and clear evidence, have found you guilty.

These offences having been thus legally ascertained and fixed upon you, his Excellency the President, and the Honorable the Supreme Executive Council, attentive to the honor and interest of this state, were pleased to inform the judges of this court, as they had frequently done before, that the minister of France had earnestly repeated a demand, that you, having appeared in his house in the uniform of a French regiment, and having called yourself an officer in the troops of his Majesty, should be delivered up to him for these outrages, as a Frenchman, to be sent to France; and wished us in this stage of your prosecution, to take into mature consideration, and in the most solemn manner to determine:—

1. Whether you could be legally delivered up by council, according to the claim made by the late minister of France?

2. If you could not be thus legally delivered up, whether your offences in violation of the law of nations, being now ascertained and verified according to the laws of this commonwealth, you ought not to be imprisoned, until his most Christian Majesty shall declare, that the reparation is satisfactory?

3. If you can be imprisoned, whether any legal act can be done by council, for causing you to be so imprisoned?

*116] *To these questions we have given the following answers in writing:—

"In compliance with the request of his Excellency the President, and the Honorable the Supreme Executive Council, we postponed passing sentence upon Charles Julian de Longchamps, until we had maturely considered the three questions above proposed for our determination. On the 10th and 12th days of July, the several questions were argued before the court by five counsel, two on the affirmative and three on the negative side. We have kept the matter under advisement until this day, and now deliver our opinion thereupon.

"1. And as to the first question, we answer, that it is our opinion, that, in this case, Charles Julian de Longchamps cannot be legally delivered up by council, according to the claim made by the minister of France. Though, we think, cases may occur, where council could, *pro bono publico*, and to prevent atrocious offenders evading punishment, deliver them up to the justice of the country to which they belong, or where the offences were committed.

"2. Punishments must be inflicted in the same county where the criminals were tried and convicted, unless the record of the attainder be removed into the supreme court, which may award execution in the county where it sits; they must be such as the laws expressly prescribe; or where no stated or fixed judgment is directed, according to the legal direction of the court; but judgments must be certain and definite in all respects. Therefore, we conclude, that the defendant cannot be imprisoned, until his most Christian Majesty shall declare that the reparation is satisfactory.

"3. The answer to the last question is rendered unnecessary, by the above answer to the second question."

The foregoing answers having been given, it only remains for the court to pronounce sentence upon you. This sentence must be governed by a due consideration of the enormity and dangerous tendency of the offences you have committed, of the wilfulness, deliberation and malice wherewith they were done, of the quality and degree of the offended and offender, the provocation given, and all other circumstances which may any way aggravate or extenuate the guilt.

The first crime in the indictment is an infraction of the law of nations. This law, in its full extent, is a part of the law of this state, and is to be collected from the practice of different nations, and the authority of writers. The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations—he is guilty of a crime against the whole world.

*All the reasons, which establish the independency and inviolability of the person of a minister, apply likewise to secure the immuni- [*117
ties of his house. It is to be defended from all outrage; it is under a peculiar protection of the laws; to invade its freedom, is a crime against the state and all other nations.

The *comites* of a minister, or those of his train, partake also of his inviolability. The independence of a minister extends to all his household; these are so connected with him, that they enjoy his privileges and follow his fate. The secretary to the embassy has his commission from the sovereign himself; he is the most distinguished character in the suit of a public minister, and is, in some instances, considered as a kind of public minister himself. Is it not, then, an extraordinary insult, to use threats of bodily harm to his person, in the domicil of the minister plenipotentiary? If this is tolerated, his freedom of conduct is taken away, the business of his sovereign cannot be transacted, and his dignity and grandeur will be tarnished.

You then have been guilty of an atrocious violation of the law of nations; you have grossly insulted gentlemen, the peculiar objects of this law (gentlemen of amiable characters, and highly esteemed by the govern-

ment of this state), in a most wanton and unprovoked manner: and it is now the interest as well as duty of the government, to animadvert upon your conduct with a becoming severity—such a severity as may tend to reform yourself, to deter others from the commission of the like crime, preserve the honor of the state, and maintain peace with our great and good ally, and the whole world.

A wrong opinion has been entertained concerning the conduct of Lord Chief Justice Holt and the court of king's bench, in England, in the noted case of the Russian ambassador. They detained the offenders, after conviction, in prison, from term to term, until the Czar Peter was satisfied, without ever proceeding to judgment; and from this, it has been inferred, that the court doubted, whether they could inflict any punishment for an infraction of the law of nations. But this was not the reason. The court never doubted, that the law of nations formed a part of the law of England, and that a violation of this general law could be punished by them; but no punishment less than death would have been thought by the Czar an adequate reparation for the arrest of his ambassador. This punishment they could not inflict, and such a sentence as they could have given, he might have thought a fresh insult. Another expedient was, therefore, fallen upon. However, the princes of the world, at this day, are more enlightened, and do not require impracticable nor unreasonable reparations for injuries of this kind.

The second offense charged in the indictment, namely, the assault and battery, need no observations.

Upon the whole, THE COURT, after a most attentive consideration of every circumstance in this case, do award, and direct me to pronounce the following sentence:—

*118] *That you pay a fine of one hundred French crowns to the commonwealth; that you be imprisoned until the 4th day of July 1786, which will make a little more than two years' imprisonment in the whole; that you then give good security to keep the peace, and be of good behavior to all public ministers, secretaries to embassies and consuls, as well as to all the liege people of Pennsylvania, for the space of seven years, by entering into a recognisance, yourself in a thousand pounds, and two securities in five hundred pounds each: that you pay the costs of this prosecution, and remain committed until this sentence be complied with.(a)

(a) See Ex parte Cabrera, 1 W. C. C. 232; United States v. Little, 2 Id. 205; United States v. Hand, Id. 435; United States v. Ortega, 4 Id. 531.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

DECEMBER TERM, 1784.

YOUNG *v.* REUBEN.

Award.

An award of a sum of money, due at a prior date, with interest, is void for uncertainty.[1]

UNDER a rule of this court, referees reported, "that the sum of 75*l.* *was due the* 3*d of March last*, with interest on the same." The time mentioned was several months before the meeting of the referees; and, on motion, THE COURT set aside the report for the uncertainty; as there might have been a sum due on the 3d of March, and nothing due at the time of making the report.(*a*)

GERARD *v.* BASSE *et al.*

Partnership.

A judgment entered on a bond executed by one partner, with one seal, in the name and behalf of both, was set aside as to the partner who did not sign, but held valid as to the other.[2]

THE defendants declining in their circumstances, and being much pressed by their creditors, Basse fled, and Soyer was imprisoned at the suit of the plaintiff. During his confinement, he executed a bond and warrant to confess judgment, to which there was *one* seal, and the signature was in this form, "John Abraham Soyer, for Basse & Soyer."

And now, a motion was made to set aside the judgment, at the instance of the creditors in general, in order that an equal distribution might be

---

(*a*) See Barnet *v.* Gilson, 3 S. & R. 340; Burkholder *v.* McFerran, Id. 422; Zerger *v.* Sailor, 6 Binn. 24; White *v.* Jones, 8 S. & R. 349.

[1] Overruled in Wood *v.* Earl, 5 Rawle 45.

[2] Re-affirmed, in Haskinson *v.* Eliot, 62 Penn. St. 393; Quillan *v.* Lawrence, 4 W. N. C. 239; Bitzer *v.* Shunk, 1 W. & S. 340. But where one partner confesses judgment against the firm, for a partnership debt, the interest of all the copartners in the firm property may be taken in execution under it, and sold. Ross *v.* Howell, 84 Penn. St. 129; Vandegrift *v.* Redheffer, 10 W. N. C. 484; Carson *v.* Beems, 3 Phila. 433.

made of the effects under a domestic attachment, which had issued against Basse & Soyer.

Sergeant and *Moylan*, in support of the motion, argued, that the bond was a payment of the debt, in the eye of the law; and that, *although *120] Basse was liable to Soyer's action for a contribution, yet, not having signed the warrant, he was not subject to the execution of Gerard, the plaintiff. 2 Black. Com. 295; 3 Bac. Abr. 590; 2 Id. 227, 358; 2 Vern. 293; 2 Ch. Cases, 228. They said, that the execution of deeds was not to be regulated by, nor does the effect of them depend upon, a particular custom of merchants; but they are derived from a superior source, to wit, the law of the land; and they insisted, that Basse not having joined in the warrant, the judgment, being joint, must fall to the ground. 2 W. Black. 294; Shep. 69.

Ingersoll, in support of the judgment.—It is regularly true, that, according to 3 Bac. Abr. 611, one merchant may bind his partner, by accepting a bill drawn on both. If then, in substance, the act of one obliges the other, what difference arises from the circumstance of the delivery not being formally executed? That question was agitated in the case of *McKim* v. *McFarlan:* There, Levinz indorsed a note of McFarlan's to McKim; but being indebted to McFarlan, he thought it proper to give him previous notice of the transaction, and, accordingly, threw the note into his desk with that design. During his absence, McKim, who had given a valuable consideration for the note, persuaded Mrs. Levinz to give it up to him, and afterwards, sued McFarlan upon it, who grounded his defence upon this, that the note was never delivered over.

Sergeant.—Improper and false suggestions were used, to induce Mrs. Levinz to deliver the note.

Ingersoll.—True: but the point in discussion was the delivery; and the jury found for the plaintiff. Cowp. 206. Any proof of intention to assent to a delivery is sufficient—no particular mode of action, no form of expression, are necessary. The present question, however, is, whether the court will confirm the judgment as to the partner who sealed the warrant, and vacate it as to the other. The adverse counsel have cited 2 Bac. Abr. 227, 358, to show, that the judgment, being an entire thing, must be wholly set aside if at all. But this doctrine is fully refuted by Cro. Eliz. 322; 2 W. Black. 1133. With respect to the warrant's being executed, while Soyer was in prison, it may be observed, that an attorney was present; and in *Slayter's Case*, the court determined, that it was not necessary the attorney should be for the party; but that it was enough, if the business was fairly transacted in the presence of an attorney. Here, neither fraud nor violence are suggested.

Lewis, on the same side, stated two questions: 1st. Whether, upon the facts, this judgment can be set aside as to both Basse and Soyer; and 2d. Whether it can be set aside as to one, and continued against the other?

1st Point. As this was a joint debt, justice naturally requires that the judgment should be confirmed; and it being admitted, that a contract, not under seal, made by one, would bind both partners, we allege that the seal cre-

ates no difference, for the *causa contractu* *is the sole criterion. Seals are of the same effect in *lex mercatoria* as at common law; and there is no authority to maintain the opposite doctrine; for Shep. 69, is not the case of joint contractors. The books, in general, where they speak of the obligation imposed on one partner by the contract of another, mention only notes, and whether under seal or not, is not distinguished. When we declare upon them, we allege the subscription of both partners, though in fact, one only subscribes. Therefore, and because delivery is no further necessary than as evidence of passing the interest, the first point seems determined in the negative.

2d Point. He observed, that the several authorities quoted on the other side, were drawn from writs of error; and, as this record could not appear in its present form, if carried into a superior court, he inferred, that either the authorities were not applicable, or the record was to be considered upon the ground of a removal by a writ of error: and in that case, for error *dans le record*, the judgment must be wholly reversed; but when the error is *dehors*, the judgment may be reversed in part, and confirmed in part. 1 Leon. 317; Cro. Eliz. 115; 3 Lev. 36; Moore 564. Besides, he contended, that the release of errors, contained in the warrant of attorney, purges and protects whatever might be deemed irregular with respect to Soyer; although it may not be sufficient to set up a void proceeding against Basse. 2 Str. 1215; 3 Mod. 109; 6 Co. 25.

Sergeant, in reply, made three points: 1st. That the bill of one binds both, from the necessity of trade; but that the necessity does not extend, nor does the rule exist, in the case of deeds and other specialties. 2d. That a judgment cannot be set aside in part, or against one only of the defendants. Where, indeed, the different parts of the judgment are, in their nature separable, as in fines and common recoveries, mere modes of assurance, it may be done; and to those cases only, the adverse authorities are confined. 2 Bac. Abr. 569, explains the mode of reversing judgments; and 2 Bac. Abr. 227, is so full upon the impartibility of judgments, that it cannot be too often insisted upon, in the present case. 2 W. Black. 1131, contains the same doctrine. 3d. The release of errors must be considered under the distinction in 3 Mod. 109, which shows that where divers are to recover in the personalty, the release of one is a bar to all, but it is not so in point of discharge. 6 Co. 25, is explicit, that, where two or more are charged jointly, if they bring a writ of error to discharge themselves, the release of one cannot bar the other; for, they have not any interest or benefit, but a joint charge and burden, which cannot be discharged or released, unless by the plaintiff who has the interest and benefit of it. If, therefore, Soyer's release does not discharge the error, he concluded, that for the other reasons, the judgment must be set aside.

The PRESIDENT delivered the unanimous opinion of the court, as follows:(*a*)

SHIPPEN, President.—This is a motion to set aside a judgment entered

---

(*a*) The opinion here inserted is copied from President SHIPPEN's MS., and gives the sentiments of the court, as delivered by him at length, of which Mr. Dallas's original report furnished only an abstract.

upon a warrant of attorney, against the defendants. The cause assigned is that the warrant of attorney was not executed by both the partners, but by Soyer alone. That being a deed, it is not the act of those who do not seal and deliver it; to this, it is answered, that being the act of one partner in trade, in the name of him and his partner, it should be deemed the act of both, although under seal.

*122] *As to this point, we are of opinion, that in all mercantile transactions, the act of one joint partner, in matters relating to their joint trade, should be deemed the act of both, although it be the signing bills of exchange, receipts, &c. But this seems to us to be confined to such acts and to such writings as are of a mercantile nature, such as are usually and necessarily done in a course of trade, and without which the business of the partnership could not be conveniently carried on. But as to deeds, they are matters of a different nature, and not necessarily connected with trade, but subject to the rules of law independent of trade and commerce. We find no instance where they are distinguished in the case of merchants from other cases. We, therefore, are of opinion, that the warrant of attorney in the present case executed by Soyer alone, in the name of Basse & Soyer, is not the act of Basse, and therefore, the authority for confessing judgment against him is wanting.

But the motion goes further, it is to set aside the judgment entered against Soyer himself, on the warrant of attorney actually executed by him, on the ground of its being a joint proceeding against them both, and that if the judgment is set aside at all, it must be set aside *in toto*.

It is not disputed, that there was a real *bonâ fide* debt due from Basse & Soyer to the plaintiff, that Soyer executed the bond and warrant of attorney, freely and without compulsion, and that there is no ground for setting it aside, from any unfairness in the transaction. It is likewise not disputed, but that if two persons are named as grantors or obligors in a deed, and one only execute it, it is a good deed as to him who seals it, and void as to the other. Consequently, that in the present case, this is a good bond and warrant of attorney as to Soyer; and it is not disputed, that if the judgment had been entered up against Soyer alone, it would have been good.

The question is, then, whether, under these circumstances of the case, we shall take up this matter of error, if it is one, in a summary way, and decide upon it, as if before us on a writ or error, or not.

Judges are bound to decide according to the rules of law, but when they see a fair creditor in danger of losing his debt by a misapprehension or slip of his attorney, they will be attentive to prevent it. I acknowledge, my conscience would revolt at the idea of permitting it, if, by any law authority, I can be supported in preventing it.

The law in 2 W. Bl. 1133, has set us the example; we there see the judges, on an application of this sort, set aside a warrant of attorney as to one, and let the other shift for himself. We may, with equal reason, set aside the judgment as to the man who gave no authority for entering it, and let the other who did really execute it shift for himself.

We are disposed to go further, if it shall be asked of us. We see no reason why, in this case, we may not give leave to the plaintiff to strike the name of Basse out of the proceedings, as a mere nullity, as well as the

judges in that case, struck the name of the defendant out of the warrant of attorney.

As to favoring these warrants of attorney. However we might wish to see something like an act of bankruptcy take place here, whereby all creditors would come in equally, yet as the law stands, preferences are allowed, if obtained fairly, and the law favors the vigilant.

Accordingly, judgment set aside as to Basse, and confirmed as to Soyer.(*a*)

(*a*) The principle upon which the case of Gerard *v.* Basse and Soyer was decided has governed the courts in subsequent decisions. In the United States *v.* Astley (3 W. C. C. 508), and Taylor *v.* Coryell (12 S. & R. 249), the general rule was distinctly recognised, that in the case of a *sealed* instrument, the act of one partner is not sufficient to bind the other. In the first of these cases, however, Judge WASHINGTON admitted the exception, that the deed will be valid, if executed in the presence, or by the authority of the other partner; and in Taylor *v.* Coryell, Judge DUNCAN seemed to think it clear, that a subsequent acknowledgment by the other partner would ratify the deed. The principal point decided in the latter case was, that one partner might bind the firm by an agreement, *not under seal*, to refer to arbitration any partnership matter, except, perhaps, where the other party openly dissented. How far an assignment of the partnership effects made by *one* partner for the benefit of creditors will be valid, see Pearpoint v. Graham, 4 W. C. C. 232. See also the remarks of President SHIPPEN upon this case. in Pleasants *v.* Meng, *post*, 380.

SUPREME COURT OF PENNSYLVANIA.

APRIL TERM, 1785.

DAVISON'S Lessee *v.* BLOOMER.

Evidence.

Where there are two subscribing witnesses to a deed, one of whom becomes afterwards interested, his handwriting cannot be proved, if the other witness resides within the county.

A DEED, attested by two witnesses, one of whom had married the lessor of the plaintiff, the other residing within the county and not produced, was offered in evidence, upon proof of the handwriting of the witnesses.

Hartly objected, that it would be better evidence to prove the execution of the deed by the absent witness, not interested; and therefore, this ought not to be allowed.

Yeates contended, that if a witness is incapacitated, either by his own act, or by the act of God, proof of the handwriting is sufficient; as, where a witness has been convicted of perjury.

BY THE COURT.—There is a case in Strange where a party who was a witness to a bond afterwards became interested, and, although the proof of his handwriting was admitted, yet there must, likewise, have been proof that the other witness could not be found.(*a*) The best evidence of which the case reasonably admits has not been offered; and therefore, we cannot allow the deed to be read on this occasion.(*b*)

(*a*) The case alluded to is, probably, Godfrey *v.* Norris, 1 Str. 84, where the plaintiff, who was *administrator* of the obligee, was the *only* subscribing witness to the bond, and the court permitted his handwriting to be proved.

(*b*) Proof of the handwriting of a witness, who has become interested since the subscription, will be admitted, although the interest has arisen by his voluntary act. Hamilton *v.* Marsden, 6 Binn. 45; Lautermilch *v.* Kneagy, 3 S. & R. 202.

TRACY *v.* WIKOFF.

Computation of interest.

IN this cause, the CHIEF JUSTICE laid down the following rule in computing interest.

McKEAN, Chief Justice.—The rule of computing interest must be such, that the interest of money paid in, before the time, must be deducted from the interest of the whole sum due at the time appointed by the instrument for making the payment. For instance, a bond to pay 100*l.* with annual interest at six per cent., and at the end of six months, 50*l.* is paid in. This payment shall not be apportioned, 3*l.* to the discharge of the half-year's interest, and 47*l.* to the diminution of the principal; so as to calculate the remaining interest at six per cent. upon 53*l.* for six months: but the interest shall be charged at the end of the year upon the 100*l.*; the payment of 50*l.* shall then be deducted from the aggregate sum of 106*l.* and the obligor receive a credit for 1*l.* 10*s.* as interest of 50*l.* for six months.(*a*)

---

*WHARTON *et al.* *v.* MORRIS *et al.* [*125

Continental currency.

Equitable jurisdiction of the courts of Pennsylvania.

Where a bond was conditioned for the payment *in* 1782, of a certain sum "*in lawful current money of Pennsylvania*," it was ruled, that these words must be taken to mean the paper money emitted under the authority of Congress.

DEBT upon a bond. Plea, payment, with leave to give the special matter in evidence.

The case was this: The plaintiffs, copartners, sold to Pleasants, Shore & Co., merchants, in Virginia, a considerable quantity of tobacco, in March 1778, when the Pennsylvania scale of depreciation, estimates continental money at the rate of five for one. Articles of agreement were executed between the vendors and the purchasers, in which Pleasants, Shore & Co. covenanted to procure Willing, Morris & Inglis, merchants, of Philadelphia, as sureties for the payment of the tobacco; and, accordingly, a bond for that purpose was afterwards executed by those gentlemen, in the penalty of 12,000*l.*, on condition to be void, if Pleasants & Co. should pay the sum agreed upon (that is 7*l.* per cent.) "on the thirtieth of September 1782, *in lawful current money of Pennsylvania.*" It appeared, that Inglis, one of the defendants, had offered to pay the value of the tobacco, at the time of

---

(*a*) See Penrose *v.* Hart, *post*, p. 378; Commonwealth *v.* Miller, 8 S. & R. 458; Smith *v.* Shaw, 2 W. C. C. 167.[1]

[1] Tracy *v.* Wikoff was formally overruled, in Spires *v.* Hamot, 8 W. & S. 18. The court say, that it had long ceased to be authority. That it is as unfounded in principle, as it is in authority; for, calculating interest on payments, the debt would, in course of time, be discharged, both principal and interest, by payment of interest only. The rule established by all other decisions is, that a partial payment is to be applied to the interest, in the first place, and in the second, to the principal. The reason is, that, though interest may be reserved, to be paid yearly, half-yearly or quarterly, it accrues from day to day, and not, like rent, from year to year.

the sale, with interest; but this was refused by the plaintiffs; and no payment or tender being made upon the 30th of September 1782, they brought the present action upon the bond.

The evidence was brief, consisting only of the articles of agreement, the bond, a deposition of the offer made by Inglis, and testimony that the usual price of tobacco, during many years preceding the war, was about 20*s.* *per cwt.*

Wilcocks, *Sergeant* and *Lewis*, for the plaintiffs, contended, that this transaction was a fair and lawful wager on the part of Wharton & Co., in confidence that the continental money would recover its original value; and that, on the other hand, they ran a considerable risk; as, if it depreciated, they would have been bound to take it, provided it continued a legal currency. But the act which repealed the tender-law destroyed its currency; so that, on the 30th of September 1782, when the bond became due and payable, the only *lawful current money of Pennsylvania* was coin, of gold or silver; and that, by the terms of the bond, ought to be paid.

Governeur Morris, *Wilson* and *Ingersoll*, for the defendants, denied that the transaction was founded in a wager; and contended, that the plaintiffs had set up a hard and unconscionable demand; for, they insisted, that the *lawful current money*, expressed in the bond, meant what was current at the time of its execution; and they declared the readiness of the defendants either to pay at the rate established by the scale of depreciation, or according to the real value of the tobacco, with interest from the date of the sale.

McKean, Chief Justice, delivered a circumstantial and learned charge to the jury. He said, that the want of a court with equitable powers, like those of the chancery in England, had long been felt in Pennsylvania. The institution of such a court, he observed, had once been agitated here, but the houses of assembly, antecedent to the revolution, successfully opposed it; because they were apprehensive of increasing, by that means, the power
*126] and influence *of the governor, who claimed it as a right to be chancellor.(*a*) For this reason, many inconveniences have been suffered. No adequate remedy is provided for a breach of trust; no relief can be obtained in cases of covenants with a penalty, &c. This defect of jurisdiction has necessarily obliged the court, upon such occasions, to refer the question

---

(*a*) A court of chancery was actually established in Pennsylvania, in the year 1720, during the administration of Sir William Keith, and exercised jurisdiction for several years. Some of its proceedings are extant, and a few titles to real estate are derived from its decrees. The history of the attempt to establish a court of equity in this state is set forth in a case stated for the opinion of the attorney and solicitor-general of England, in 1736, which, with their answers, is in possession of the present editor. As they have never been published, and will serve to illustrate the legal history of Pennsylvania, it is supposed that, by subjoining them as an appendix to this volume, the editor will render an acceptable service to the profession.[1]

[1] The Registrar's Book of Governor Keith's court of chancery, long preserved in the secretary's office in Harrisburg, has since been published as an appendix to William Henry Rawle's Lecture on Equity in Pennsylvania, where much interesting information on this subject, will be found by the inquiring student of the History of Pennsylvania Law.

to the jury, under an equitable and conscientious interpretation of the agreement of the parties; and it is upon that ground, the jury must consider and decide the present cause.(*a*)

His Honor, having recapitulated the evidence, concluded with the following observations:—

The bond is made payable in current money of Pennsylvania; but, I would ask, what is the *current money of Pennsylvania?* For my part, I know of none, that can properly be so called, for current and lawful are synonymous. In Great Britain, the king, by his proclamation, may render any species of coin a lawful currency. But here, it can only be done by an act of assembly; and except in the temporary laws for supporting the former emissions of paper-money, there is no pretence that the legislature has ever interfered upon this subject. The expressions in the 2d section of the act of the 27th January 1777 (P. L. p. 6), cannot be construed to make the Spanish milled dollars a legal tender, as they are only mentioned by words of reference; but that which was declared to be a lawful tender, and consequently became the legal currency of the land, was the money emitted under the authority of congress.(*b*)

To that species of money, therefore, the bond must be taken to relate; and the jury will either reduce the penalty to gold or silver, according to the scale of depreciation; or, if they think it more equitable, they will find a verdict for the value of the tobacco, and give the plaintiffs legal interest from the day of the sale.

The jury adopted the latter opinion, and found for the plaintiffs with 3600*l.* damages, and 6*d.* costs.

Wilson's Lessee *v.* Campbell.

Ejectment.

A defendant in ejectment, who enters into the common rule, must confess *lease, entry* and *ouster* for *all* the tenements laid in the declaration.

Ejectment. *Yeates*, for the defendant, when called upon at the trial to confess *lease, entry and ouster*, confessed *lease, entry and ouster* for *part only* of the tenements laid in the declaration.

(*a*) The equitable jurisdiction at present exercised by the common-law courts of Pennsylvania deserves a more full examination than can be given to it within the usual limits of a note, and a mere reference to the cases in which it has been considered, would serve little valuable purpose. It ought to be remarked, however, in this place, for the information of persons not familiar with this peculiar system, that the *jury* are not the administrators of equity, as might be supposed from a passage in the text. It is well settled, that the *court* alone determine whether the party is entitled to relief, and also decide upon the extent and manner of it. The jury only ascertain the facts; and if in their verdict they disregard the rules of equity laid down by the court, the same remedy by a new trial exists, as when they disregard the law. See Peebles *v.* Reading, 8 S. & R. 484; and Kuhn *v.* Nixon, 15 Id. 118.[1]

(*b*) See Lee *v.* Biddis, *post*, p. 175; Hartley *v.* McAnulty, 4 Yeates 95; Dorrance *v.* Stewart, 1 Id. 349; Shelby *v.* Boyd, 3 Id. 321.

[1] For a full review of this interesting question, see 1 Troubat & Haly's Treatise (5th edition), p. 14, *et seq.*

This was opposed by *Bradford*, who contended, that the defendant having taken general defence, when he first pleaded, and entered into the common rule, he must now confess *lease, entry* and *ouster* as to the *whole*; but the plaintiff can recover no more than he proves the defendant to be in possession of. 1 Att. Prac. 317.

By the Court.—The defendant must, in this case, confess *lease, entry* and *ouster* for the whole tenements laid in the declaration.(*a*)

(*a*) This case was determined at Carlisle N. P., on the 16th May 1785, before McKean, Chief Justice, &c.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

JUNE TERM, 1785.

SHOEMAKER *v.* SHIRTLIFFE.

Stay of proceedings.

The court refused a rule to show cause why execution should not be stayed upon a judgment, until another action, brought upon the act of assembly against usury, by the defendant against the plaintiff, should be determined.

Dallas moved for a rule to show cause why the execution issued in this action, should not be stayed, until another action, brought upon the act of assembly against usury, by Shirtliffe, the present defendant, against Shoemaker, the present plaintiff, was determined.

The motion was founded upon an affidavit, which stated, that the plaintiff and defendant, having been concerned in trade, borrowed money from one Anne Gibbs upon a usurious contract; that Anne Gibbs became pressing for the payment of the money, while the defendant was out of town; that the plaintiff thereupon gave her his separate securities to pay within a certain time; that upon the defendant's return, he executed a bond and warrant of attorney to the plaintiff, for his proportion of the debt due to Anne Gibbs; that the present execution is issued upon the judgment confessed by virtue of that warrant of attorney; that an action is depending against Gibbs, on the act of assembly against usury, and that the defendant has also instituted a suit against the plaintiff, upon the same act, returnable to September term 1785.

*It was suggested, in support of the motion, that the object of the execution was a share which the defendant held in a vessel with the plaintiff, and others; and that if this share was taken and sold, the defendant would be in danger of losing satisfaction, if he recovered in the *qui tam* action which he had instituted against the plaintiff. [*128

Ingersoll and *Sergeant* opposed the rule, in the first instance. They contended, that, even admitting there had been an usurious contract between the parties to this suit and Anne Gibbs; yet, as it did not appear that any part of the money had been paid, no penalty was incurred; for the words of the act are, that no person shall *receive* or *take*. They said, likewise, that

although the consideration of the bond was originally usurious, the act of assembly did not make it void; but only worked a forfeiture to the value of the thing or money lent; and that, therefore, without going further, if the defendant's cross-action did not appear, from his own stating, well founded, it should not be made the instrument of delaying the plaintiff's satisfaction.

Dallas asserted, that he was prepared to prove Gibbs had received a part of the money, and that, therefore, the usury was complete. He argued, that if the original agreement be corrupt between all the parties, and so within the act, no color would exempt it from the dangers of usury. 1 Brownl. 73; 2 And. 428; 4 Shep. Abr. 170. That it is not material whether the payment of the principal and the usurious interest be secured by the same or different conveyances, for all writings whatsoever for the strengthening such a contract are void. 1 Hawk. 248; Cro. Jac. 252, 508. That a second bond, made after the forfeiture of a former, and conditioned for the receipt of interest, according to the penalty of the forfeited bond, is within the statute. 1 Hawk. 248; 3 Keb. 142. That if a bond depends on some other deed, and that deed becomes void, the bond is void also. 2 Wils. 341. And that a fine levied, or a judgment suffered for the security of money, in pursuance of an usurious contract, may be avoided, by an averment of the corrupt agreement, as well as any parol contract. 1 Hawk. 248; 3 Rol. 509. He said, that the defendant did not wish to diminish the plaintiff's security, but only to obtain a cessation of proceedings until the illegal consideration of the bond was ascertained by the event of the cross-action; that if the consideration was illegal by statute, it was void by the common law; and, consequently, that the defendant would then be entitled to recover from the plaintiff as much as was now taken in execution. 2 Wils. 341; Carth. 225. But—

By the Court.—We cannot in this way enter into a consideration of the merits of another action. Nor ought we, upon so slight a foundation, to grant a rule to show cause; for such rules, by the delay which they occasion, are frequently as prejudicial to the plaintiff, as if they were made absolute.

Dallas took nothing by his motion.

---

*129] *Scottin *v.* Stanley *et al.*

Owners of vessels.

Part-owners of a vessel are liable to tradesmen, for articles furnished, or work done to the ship, *after* they became owners, if they are charged to the ship, although the contract was made *before*.

John M. Taylor had put a vessel on the stocks, and contracted with the different tradesmen. When the ship was a little advanced, he sold one-half to Stanley, and one-quarter to Joseph Carson, or rather interested them each so much in the concern. Taylor continued to be ship's husband, fitted out the ship, received the bills of disbursements, and was paid by the other partners their respective proportions of the building and outfits. While the ship was on her first voyage, Taylor failed. The plaintiff, who

was the painter, commenced this action against all three, Stanley and Carson refusing to pay his bill.

On the 12th of August, the cause came on for trial. It did not appear in testimony, when Stanley and Carson became interested, but it was admitted to be after the contract. The plaintiff made his charges in his book "to Ship Hannah," and showed, that on the 4th of April, Stanley and Carson had engaged a master for the ship. The first item of his account was dated the 3d of April; but all the rest, after they had done this act of ownership.

Taylor offered to confess judgment; and *Sergeant* and *Sitgreaves*, for the other two defendants, contended, that reference should be had to the time of the contract made, which being when Taylor was sole owner, the plaintiff could resort to him alone; that no purchase made or interest acquired afterwards, could make Stanley and Carson liable for a contract made with Taylor only, and on Taylor's sole credit, and that this cause was particularly strong, it being proved that they had each paid their proportions already to the ship's husband, Taylor. But—

SHIPPEN, President, instructed the jury, that as the work was performed after they had become owners, and appeared avowedly so, it was certainly done on their credit; and not only the ship's husband, but all the real owners at the time of the work done, were liable.[1]

Verdict for the plaintiff.

Lewis, for the plaintiff, cited and relied on Cowp. 636.

BUCKLEY *v.* DURANT.

Award.

Where exceptions to a report of referees arise from the face of the report, and depend upon construction of law, they need not be filed in writing, within four days.

THIS was an action of Trover. *Non cul.* pleaded, and issue. Afterwards, the cause was referred, and report made, "That plaintiff pay to defendant 3*l.*; upon which payment being made, defendant to restore to plaintiff certain articles, for trover and conversion of which the action was brought." Judgment *nisi* had been entered on this report; and now August 13, 1785, *Lewis*, for the defendant, offered to state his objections to the confirmation of the report. *Sergeant* and *Bankson* objected to going into the argument, and insisted, that judgment should be made absolute, *because no exceptions to the report had been filed in writing, which [*130 they contended ought to have been done, within four days from the entry of the judgment *nisi*. *Lewis* admitted, that where the exceptions arose from facts, such as misbehavior of the referees, want of notice, &c., it was necessary that they should be in writing; but insisted, that where the objections arose from the face of the report, as in the present case, and depended upon construction of law, there was no such necessity. And accordingly THE COURT permitted him to proceed.(*a*)

(*a*) Shewell *v.* Wycoff, *post*, p. 312; Shoemaker *v.* Smith, 2 Binn. 239; Hamilton *v.* Gallagher, 4 Yeates 202; Davis *v.* Canal Co., 4 Binn. 296; Thellusson *v.* Cramond, 1 W. C. C. 319.

[1] See Adams *v.* Carroll, 85 Penn. St. 209.

He took three exceptions:—

1. The act of assembly giving references, by rule of court, in actions depending, puts the reports of referees on the same footing precisely with the verdict of a jury. Now, in trover, a verdict can never be for restoration of the specific chattels, but for damages only, and such a verdict would be error; therefore, he inferred the same law in the case of a report.

2. The report, on the face of it, shows the action of the plaintiff to be illegal—for pawnee has a right to detain his pledge, until payment of the sum for which the pledge was given; and until such payment, pawnor can have no action to recover the thing pawned, or damages. Now, the report finds 3*l.* due from the plaintiff to the defendant, which at once defeats his right of action, and shows that judgment should be for the defendant.

3. A report should be such a one as that the court may give judgment, and award execution thereon. Judgment cannot be for both plaintiff and defendant on one issue; and this report gives something to each; it is a report on both sides; judgment and execution can be only for one.(*a*)

The Court inclined strongly to be of opinion with *Lewis*, particularly on the first point; but no judgment was given, that the parties might, if they would, accommodate the matter by a new reference; and, accordingly, it was afterwards referred *de novo*.

Carrew *v.* Willing.

Bail-bond.

Proceedings on a bail-bond stayed, on paying costs, &c., after a *fi. fa.* issued at the third term.

Capias, to June 1784. The bail-bond sued to September 1784; and December 1784, judgment was signed on the bail-bond suit, *nisi* special bail filed in thirty days. Default was made in filing special bail, and a *fi. fa.* issued to June 1785.

*131] *And now, August 8, 1785, *Sitgreaves* filed defendant's affidavit of a just defence, and obtained a rule to show cause, why the proceedings in the bail-bond suit should not be stayed, on paying costs, pleading issuably in the original action, taking short notice of trial, and consenting that the judgment on the bail-bond should stand as a security. He cited *Birch* v.

(*a*) Mr. *Sergeant* mentioned, that on a former argument of this cause, this exception was combated by an observation, that even if judgment could not be entered on the report, according to the common forms, yet the reference being made under the eye of the court, they would grant an attachment to compel compliance with the report, and the case of Ralston *v.* Stewart was mentioned, where the supreme court, it was said, established this point. Time had been given to the plaintiff's counsel to search for notes of this case; and no note being now produced, Mr. *Lewis* said, that although he was concerned in that cause, with the gentleman who cited it (Mr. *Sergeant*), yet he could not remember that any such point had been adjudged, and contended, that the act of assembly gave no such authority, and that no instance of such an attachment had ever beer known in our practice. The case of Stewart *v.* Ralston, is cited by President Shippen, in Kunckle *v.* Kunckle, *post*, p. 365, where it was held, that a party may be compelled by attachment to perform a specific act, ordered by the award. And see Blackburn *v.* Markle, 6 Binn. 174, and *s. c.* in 12 S. & R. 148.

Graves, Barnes's Notes 74; *Otway* v. *Cockayne*, Ibid. 35; *Seaber* v. *Powell*, Ibid. 91; *Morley* v. *Carr*, Ibid. 112.

On the 13th of August, *Sergeant*, for the plaintiff, showed cause; but, after argument, the rule was made absolute.(*a*)

Campbell *v.* Richardson.

Lien of recognisance of bail.

A recognisance of bail binds lands, only from the date of the judgment on the *scire facias*.

The defendant had been bail for his brother, who suffering judgment to go against him, a *scire facias* was issued against the defendant, and in due course, judgment thereupon. In the *interim*, between the recognisance of bail and judgment on the *scire facias*, several judgments were obtained against the defendant by his proper creditors, executions issued, and his real estate was seized and sold. But the proceeds not being sufficient to satisfy all the judgments, the sheriff brought the money into court, to be disposed of as the court should direct.

Sergeant, for the plaintiff, Campbell, insisted, that a recognisance of bail is a lien upon the land, from the date of the recognisance, and therefore, claimed a preference to all judgments afterwards obtained, although they might be previous to the judgment on the *scire facias*. He cited to this purpose, Stat. 29 *Car. II.*, *c.* 3; 2 Bac. Abr. 363, 365; 10 Vin. 559, 563; 2 Salk. 564; Cro. Eliz. 551; Hob. 95.

Ingersoll and *Lewis*, on the contrary, contended, that Campbell should only have preference from the date of the judgment on the *scire facias*; and argued from the statute of frauds and our act of assembly ascertaining the mode of paying the debts of decedents, and cited 1 Peere Wms. 333; Cro. Jac. 449; 2 Lill. 69; 4 Co. 59, 60; 5 Co. 28, 29; 6 Co. 45; 11 Mod. 223; 1 Roll. Ab. 926; Sayer 121; Ld. Raym. 157.

After consideration, the President delivered the opinion of the court, on the 26th of August.

Shippen, President.—This is a question concerning the binding nature of a recognisance of bail, as to the lands of the bail; and whether, in Pennsylvania, a prior recognisance creditor, or subsequent judgment-creditors, shall have the preference.

From the cases cited, it appears, that, although lands in England are bound by recognisance, yet there is some uncertainty as to the time from which they are bound: whether from the *caption*, or from the *enrolment* of the recognisance; or from the *judgment* against the principal; or from a *non est inventus* returned upon the *ca. sa.* And several of the cases which mention that lands are bound upon the **caption*, are since the statute of frauds, which says that the lien shall be from the *enrolment*. [*132

(*a*) Priestman *v.* Keyser, 4 Binn. 344; Union Bank *v.* Kraft, 2 S. & R. 284; McFarland *v.* Holmes, 5 Id. 50; Kinsey *v.* Kraft, 1 Bro. 250; Fitler *v.* Probasco, Id. 288; Bank *v.* Lassel, 2 Yeates 387. And see Bobyshall *v.* Openheimer, 4 W. C. C. 388.

I do not find that there have been any legal decisions upon this point in Pennsylvania; but a general opinion has taken place, which has been carried into universal practice, that recognisances do not here bind lands, until they are proceeded upon to judgment against the bail. Hence it is, that, whenever a purchase, or mortgage, is made, the examination at the offices, and the certificates which are given by the prothonotaries, are only of the judgments in force against the seller or mortgagor, and not concerning recognisances. The practice has, indeed, been so general, that all the conveyancers and lawyers, for a long course of years, have, on such occasions, confined their inquiries to that circumstance alone; and many titles must, therefore, depend upon it, which would be shaken, if a contrary construction should now be adopted.

Whether this opinion took its rise from the different situation in which the lands of this country are from those of England, and from their being liable to be sold for debts; or from the silence of the legislature upon the subject; or from what other cause, we can but conjecture. It is remarkable, however, that when our act for the prevention of frauds was made, in the year 1772, although the legislature copied the clause in the English statute relating to judgments, and was minutely exact as to the time from which they should bind lands, yet they totally omitted the clause relating to recognisances. This silence, it is true, is no abrogation of a law; but it looks as if the assembly had taken up the popular idea, that recognisances did not bind until judgments were obtained upon them, and therefore, they thought that no particular provision was in that respect necessary. Upon what principle, indeed, could they else have been so careful of innocent purchasers in the one case, and not in the other?

We may also properly take into view, that, long before the passing this act for the prevention of frauds, the relative dignity of judgment-debts, and of those upon recognisance, had been settled by a law, directing the order of paying the debts of persons deceased. That is: 1st. Physic and funeral expenses. 2d. Debts and duties to the Queen. 3d. Debts due to the proprietor and governor. 4th. Judgments. 5th. Debts due by recognisances. 6th. Rents, &c. If, however, it should be said, that this is only a direction in what order debts shall be paid, without any respect to the binding nature of judgments and recognisances, it may be answered, that, from the situation of lands in this country, that consideration must necessarily be included. Here, as I have already observed, lands are chattels for the payment of debts; they are chattels too in the hands of executors; and all writs of *fi. fa.* direct the levy accordingly to be made, of the goods and chattels, *lands* and *tenements* of the deceased, in the hands of the executor. If, then, in such a case, two writs are executed upon lands, founded,

*133] one upon a prior recognisance, and the other on a judgment subsequent to the recognisance, but * prior to the judgment upon it, the court must clearly decree a preference to the judgment-creditor. This seems indeed to be a legislative direction as to recognisances in similar cases; for, what confusion would arise, from supposing the lands of *deceased* persons to be bound from *one time*, and the lands of *living* persons from *another?*

Upon the whole, we think, that great mischiefs and dangers would be imposed upon honest purchasers, if, at this time of day, we should unsettle

what has been so long the general opinion and practice on this subject. Therefore—

Let the plaintiff take preference only from the date of the judgment on the *scire facias*.(*a*)

Shoemaker *v.* Shirtliffe.

Practice.

Execution cannot issue on a judgment entered on bond, by a warrant of attorney, until the time of payment, although there is no provision in the warrant for a stay of execution.

The defendant had executed a bond, with warrant of attorney to confess judgment to the plaintiff. The bond was payable on the 1st of September 1785; but there was no provision for a stay of execution, until that time, inserted in the warrant of attorney. The plaintiff issued a *fi. fa.*, before the 1st of September, and *Dallas*, for the defendant, moved to set it aside.

The Court were of opinion, that the warrant of attorney reciting the bond, was only an instrument subservient to it; and, consequently, that the execution could not be issued, until the time given for payment was expired.(*b*)

The execution set aside.

Burrows *v.* Heysham.

Amendment.

***Scire facias* against bail, allowed to be amended by the record, after error brought.**

Scire Facias against the bail, and the judgment removed by writ of error. Upon the issuing of a *certiorari* to bring up the record, the plaintiffs moved to amend the *scire facias* by the record, substituting September,

---

(*a*) In Patterson *v.* Sample, 4 Yeates 308, the question of the lien of a recognisance was fully discussed; and although the court declined deciding in a summary way, the right to take money out of court in the particular case, yet C. J. Tilghman observed: "I think, however, the opinion of Mr. President Shippen, in Campbell *v.* Richardson, cannot now be shaken, as to the period when a recognisance binds the lands of the bail." Judge Brackenridge expressed a similar opinion; and the doctrine is believed to be now firmly established. In a very recent case (Allen *v.* Reesor, 16 S. & R. 10), C. J. Gibson, after an extensive examination of the authorities, came to the conclusion, that a recognisance was not a lien on lands, by the common law, that in England the lien took place by virtue of the stat. Westminster 2d, which is not in force in this state, and that in Pennsylvania, a recognisance is a lien upon lands only in two cases, one by express act of assembly (act of 28th March, 1803), in the case of sheriffs, and the other by long and continued usage, in the case of recognisances given for the distributive shares of an intestate's estate. Upon the case in the text, he remarked, "in Campbell *v.* Richardson, Chief Justice Shippen, when president of the common pleas (but at any time a great authority), held, that a recognisance is not a lien on the lands of special bail, and this on the ground of a general understanding, which was said to have been carried into universal practice. Had this sound lawyer and excellent judge reflected but for a moment, on the origin of the lien of recognisances, he would not have put the case on the existence of a custom."

(*b*) See Hopkins *v.* Deaves, 2 Bro. 97; Sparks *v.* Garrigues, 1 Binn. 152.

1782, for December 1781. The motion had been argued at the last term, and now came on for a second argument.

On the part of the *defendant*, it was said, that as the cause had been removed by writ of error, this court had no longer any jurisdiction over it; but this objection was not insisted upon. Doug. 130, 110, and Cowp. 841, 844, had been cited for the plaintiff on the former argument; but these were cases of ejectment; and it would overset the law, if other points were to be brought within the principle by which ejectments are regulated. With respect to amendments by the statutes of *jeoffaille*, they were only in matters
*134] of form; but *the present motion went to matter of substance, and therefore, ought not to be granted. The bail, if the judgment is misrecited in the *scire facias*, is entitled to relief by writ of error. Salk. 52; Ld. Ray. 1057; s. c. 6 Mod. 263; 2 Str. 1165; Gilb. 136.

For the *plaintiff*, it was answered, that, independent of the statutes of *jeoffaille*, this might be amended. It is a rule at common law, to amend, whenever there is anything to amend by. 5 Burr. 1730, was a matter of substance, yet amended; because there the rest of the pleadings rectified the error. That, likewise, was a case after a writ of error had removed the record, and there had been an argument in the exchequer. Here, the error appears on the face of the writ, which recites the judgment to have been prior to the date of the recognisance; and in this point it is distinguishable from Salk. 52; Ld. Raym. 1057.

On the 20th of August, the PRESIDENT delivered the opinion of the court.

SHIPPEN, President.—As it has not been made any part of the argument, that the power of the court to amend, is not the same as it was before the action was removed, we shall determine the question as we should have done, if the writ of error had not been brought. Upon the liberal principles of modern practice, therefore, and indeed, for the honor of common sense, we think it incumbent upon us to direct the *scire facias* to be amended by the record. Besides the cases in the books (particularly that in Barnes 6, *Sweetland* v. *Beezely*), there are some instances in our own courts that authorize this determination. I remember, in *Scott* v. *Galbraith*, at *nisi prius*, in Lancaster,(*a*) a verdict was given for the plaintiff in ejectment, for one-half of the premises, and nothing was said respecting the other half. A motion was made *in banc* to set aside this verdict, but it was allowed to be amended, by adding, "and for the residue they find for the defendant;" although, in that case, there was not anything to amend by, but merely what was implied in the verdict.(*b*)

The rule made absolute.

(*a*) This case, by the name Galbraith's Lessee *v.* Scott, was cited by Judge YEATES, for another point, in Garwood *v.* Dennis, 4 Binn. 334, and is said by him to have been tried at the Lancaster Nisi Prius, in 1781, before MCKEAN, C. J., and BRYAN, J.

(*b*) It is now well settled, that the court below may order an amendment, after error brought, while the record remains with them. Fury *v.* Stone, 2 Dall. 184, s. c. 1 Yeates 186; Berryhill *v.* Wells, 5 Binn. 60; Paul *v.* Harden, 9 S. & R. 23. And where the record has been removed, the supreme court has sent it back for amendment.

Spackman *v.* Byers, 6 S. & R. 385. In Peddle *v.* Hollinshead, 9 Id. 285, DUNCAN, J., said, "In matters arising from the mere carelessness of the clerk in process, it is to be observed, that those things which are amendable, before error brought, are amendable, after error brought, and if the inferior court doth not amend them, the supreme court may." And see Black *v.* Wistar, 4 Dall. 267.

SUPREME COURT OF PENNSYLVANIA.

SEPTEMBER TERM, 1785.

GEYGER *v.* STOY.

Habeas corpus.

One who had been committed under an execution by a justice of the peace, for a sum beyond his jurisdiction, was discharged by the court on *habeas corpus*.

THE defendant was brought before the court on a *habeas corpus*, and the return stated, that he was committed in execution, by the warrant of a *justice of the peace*, for a debt of 10*l*. 6*s*. 3*d*.

Sergeant moved, that he should be discharged, on this principle, that although the errors of a justice, while he keeps within his jurisdiction, are binding, until his judgment is reversed; yet, where he exceeds his jurisdiction, all his acts are, in themselves, merely null and void.

BY THE COURT.—It appearing upon the face of the record, that the justice has exceeded his jurisdiction, by giving judgment, and issuing an execution, for a greater sum than *ten pounds*, we cannot but consider the whole as a nullity; and, for that reason alone, discharge the defendant.(*a*)

JACKSON *v.* MASON. JACKSON *v.* KEELY.

Practice.—Continuance.

THESE causes were marked for trial this day. *Lewis*, for the defendant, tendered the affidavit of Mason, the defendant in the first action, of the absence of a material witness. *Bradford*, for the plaintiff, desired, on the authority of the *Chev. D'Eon's Case*, *3 Burr. 1514, that the court would inquire what would be the testimony of the absent witness, in order that it might appear whether he was *really* material.

*136]

But this THE COURT refused, and ordered the cause to be continued.(*b*)

Bradford then moved, that the action against Keely should be tried;

(*a*) Where a justice keeps within his jurisdiction, however, his judgment is conclusive upon the parties, unless reversed on *certiorari* or appeal. Emery *v.* Nelson, 9 S. & R. 12.

(*b*) See Hollingsworth *v.* Duane, Wall. C. C. 46.

insisting, that the affidavit of any person but the defendant himself, was insufficient to delay a trial; and he cited Barn. 437, *Carter* v. *Uppington*, and *Gray* v. *Halton*.

But it appearing to THE COURT, that both actions were brought on one note of hand, in which Mason was the maker, and Keely the indorser, and, consequently, that Mason was liable over to Keely, he was considered as eventually interested in both actions; and therefore, both the trials were postponed on his affidavit alone.(*a*)

GRAHAM'S APPEAL.

Appointment of guardian.

Under the act of 1718, the orphans' court are not bound to appoint the guardian in socage, or by nurture, for infants under fourteen.

THIS was an appeal from the Orphans' Court of Philadelphia; and after argument, the CHIEF JUSTICE delivered the unanimous opinion of the court to the following effect:

McKEAN, Chief Justice.—The intestate had left seven children, all under the age of fourteen years; their mother married the *baron* appellant. Upon petition to the Orphans' Court, by the children, for the appointment of guardians, Enoch Edwards and another were appointed. This appeal is founded upon an idea, that the guardian *in socage*, or by nurture, must be appointed, and that the Orphans' Court have not a discretion.

In England, the next of kin, to whom the inheritance cannot descend, must be appointed guardian, the mother, therefore, would have been entitled to the appointment there; but in Pennsylvania, it depends on §§ 7 and 12 of the act of 12 *Anne*, *c.* 3.(*b*) And we all agree, that by the true construction of these sections, the Orphans' Court have a power to assign the guardianship of minors, under fourteen, to whom they please, according to their legal discretion; which legal discretion, by § 12, is confined to the choice of persons of the same religious persuasion, of good repute, and approved by the orphan. If any of these objections should occur, the court must appoint some other persons; which could not be the case, if they were confined to the guardian in socage, or by nurture.

The opinion of the court is conformable to the invariable practice in every county of the state, from the date of the act to this day; and the construction given to an act, immediately after it has passed, cannot be altered, at so distant a period, even although it might have been a little erroneous in the first instance.(*c*)

The order of the Orphans' Court confirmed.[1]

(*a*) See Hunter *v.* Kennedy, *ante*, p. 81.
(*b*) Act of 27th March 1713, 1 Sm. Laws, 81.
(*c*) See Stewart's case, 1 Bro. 288.

[1] In McCann's Appeal, 49 Penn. St. 304, it was ruled, that the legal discretion of the orphans' court, in the appointment of a guardian, is not the subject of review in an appellate court. And see Gray's Appeal, 10 W. N. C. 248.

*Vanhorn's Lessee *v.* Harrison.

Covenant to stand seised.—Estate for life.

One seised in fee of certain lands, by deed duly executed, in consideration of natural affection, "gave granted, &c., the premises, to his son A., together with all the rights, titles, interest, &c., which he then had in them: to have and to hold to the said A., without any further condition," &c.: *Held*, 1st. That this was a covenant to stand seised to uses: 2d. That A. took only a life-estate.

This was an ejectment brought for a messuage and plantation, in Bensalem township, in Bucks county. A case being stated, it was thrice argued by *Sergeant* and *Bradford*, for the plaintiff, and *Lewis* and *Wilcocks*, for the defendant.

The Chief Justice now recapitulated the material points, and delivered the opinion of the court as follows:

McKean, Chief Justice.—This cause comes before the court on a case made for their opinion. The case is long, and has stated several particulars which can have but little influence upon the decision.

The material facts are: That a certain Johannes Vandegrift was seised in fee of the premises in question, and being so seised, by his last will and testament in writing, dated the 16th March 1732, devised the same unto his eldest son, Abraham, in fee-tail, with remainder in fee to all his other children. And afterwards, by a deed or instrument in writing, sealed and delivered, bearing date the 31st of August 1743, "In consideration of natural affection, he gives, grants, &c., fully, freely, absolutely and clearly, the same premises, to his son Abraham Vandegrift, together with all the rights, titles, interest, claim and demand whatever, which he then had in the said granted premises, or any part thereof: to have and to hold unto him only, the said Abraham Vandegrift, without any further condition, as he had fully, freely and absolutely, and of his own accord, set and put in further testimony, &c."

If this conveyance passed a fee to the son Abraham Vandegrift, then judgment must be for the defendant; but if an estate for life only, then judgment must be for the lessors of the plaintiff: for, suppose the will of Johannes Vandegrift, which was executed prior to the conveyance, is taken into the case, yet the son, Abraham, had thereby only an estate-tail, which is spent by his death, without heirs of his body lawfully begotten.

When this case was first argued, the counsel on both sides considered it only in two points of view, to wit, *First*, Whether the conveyance from Johannes Vandegrift to his son Abraham was to be construed as an original conveyance at common law, or as a covenant to stand seised to uses? And, *secondly*, What was the intention of the parties, as to the estate which was to pass?

Mr. *Sergeant* contended, that it was an original conveyance at common law; and, let the intention of the parties be what it may, it could only pass an estate for life to the son, for want of proper words of inheritance.

Messrs. *Wilcocks* and *Lewis* insisted, that this deed must be considered a covenant to stand seised to uses, and that it should receive the like construction with a will, that is, to be governed by the intention of the parties. In support of their first position, "that it must be taken to be a covenant to
*138] stand seised to uses," they cited 2 Wilson 22, 75; Carthew 38; Comberbach 128; s. c. 10 Mod. 35, 36; 1 Atkyns 8; *1 Mod. 175; 2

Levinz 10; 3 Id. 372; 1 Bac. 274. For the second position, they cited Carthew 843; 1 Co. 100 *b*, 101 *a*; Littleton's Rep. 347; 5 Mod. 266. And they concluded, that if this instrument had been a will, it would appear manifestly to be the intention of the parties to pass a fee; for which they cited 6 Mod. 109, 110; Cro. Car. 450; 1 Ld. Raym. 187; 2 Willes 524.

Mr. *Sergeant*, in his reply, said, that the deed of 1743 must operate as a foeffment, and relied upon the following authorities. Co. Lit. 6 *a*; 1 Vol. Pennsylvania Laws, p. 78; Prec. in Chan. 580; Lilly's Conveyancer, 613, 614, 646; 2 Inst. 672.

Upon hearing this argument, and reading the books that had been cited on both sides, and full consideration of them, it appeared to me, that this deed, or instrument, ought to be taken as a covenant to stand seised to uses, and that the law has been long settled, that a deed shall be construed either as a common-law conveyance, or a statute conveyance, if it can be taken both ways, as will best tend to give it all the effect the parties intended. This deed then has every requisite necessary to constitute a deed of covenant to stand seised to uses. 1st. Here is a sufficient and proper *consideration*, viz., natural affection. A consideration may be either a good, or a valuable one. A *good* consideration is that of blood, or natural affection, or love; as when a man grants an estate to a near relation, as in this case, to his eldest son. Blood or marriage are the most common and suitable considerations in this species of conveyance. The *valuable* consideration is such as money, marriage, or any other equivalent given for the grant. 2 Bl. Com. 297, 336. 2d. It is a deed. 3d. Johannes Vandegrift was seised in fee. 4th. Here are apt words to convey lands; and the word grant, which is in the deed, has been adjudged in the case of *Wilkinson's lessee* v. *Farmer*, &c. (2 Wilson 75; 1 Mod. 175), sufficient, of itself, to create a covenant, and to raise an use. These are all the circumstances necessary to make a good deed of covenant to stand seised to uses.

As to the other point: How this conveyance was to be construed, whether as a deed at common law, or like a will, according to the intent of the parties? I was, at first, of opinion, from the general doctrine laid down in all the books cited at the bar, that the intention of the parties was to govern, in the same manner as in a will; and of that intention I had no doubt; for by the words used in the premises, if unrestrained by the *habendum*, it appeared manifestly, that Johannes Vandegrift had given all his right, title, interest, claim and demand whatsoever, which he had in the land, unto his son Abraham, freely, absolutely and clearly, &c., which words in a will would unquestionably pass a fee. But having, afterwards, met with two cases in 4 Burn's Ecclesiastical Law, p. 110 and 118, I hesitated. A second argument was, therefore, had on the 18th of December last, when the question that alone admitted of controversy, to wit, how far this deed of covenant to stand seised to uses, should be construed like a will, was fully considered by Mr. *Bradford*. He contended, that it required such *technical words*, as are * used and necessary in deeds at common law to [*139 pass an inheritance, that in all deeds, the word heirs is necessary to pass a fee; this is the general rule, and though there are exceptions, yet this species of conveyance to uses is not among them; which appears, 1st, from the silence of approved writers on this subject; to show which he cited, 2 Black. Com. 108; Bac. Abr. 252; 3 Comyn's Digest 214; Shepherd's Touch-

stone of Assurances, fo. 101 (97 of new edition); Co. Lit. 9. 2d. From a variety of express and positive authorities. 3 Black. Com. 370; 1 Co. 87 *b*; Co. Lit. 10 *a*; Shepherd's Touchst. 102, 106; 1 Comyn's Digest 543; 1 Co. Rep. 100 *b*; Gilbert's Uses and Trusts 75, 76. And 3d, that words, essential to convey a fee in a deed at common law, are necessary since the statute of uses, 27 *Hen. VIII.*, *c.* 10, in a covenant to stand seised to uses. To prove which he cited 5 Bacon 357; 1 Rol. Abr. 837; Cro. Eliz. 478; 2 Lill. Reg. 112; Sir Thomas Raym. 317; 2 Ld. Raym. 1151, 2, 4, &c.

We have since heard the counsel for the defendant, in answer, who chiefly dwelt upon the deed of 1743 having a relation to the estate which the covenantor had, that he having a fee, had by relative words conveyed that fee to his son; and they relied upon 2 Comyns 215; Shep. Touchst. 101; Co. Lit. 9 *b*.

Upon the whole, THE COURT have, unanimously, formed the same opinion as the plaintiff's counsel, after the most mature consideration.

1. This deed is a covenant to stand seised to uses.

2. Before the statute of uses, viz., 27 *Hen. VIII.*, *c.* 10, this deed would have passed a fee, 1 Co. 100 *b*, *Shelley's case*, though the word *heirs* is not in it. But since that statute, the limitation of uses is, in many cases, governed by the rules of common law; and no inheritance, in a covenant to stand seised to uses, or other deed to uses, can be raised, or new estate created, without the word *heirs*; because the uses are now transferred into possession, and therefore, must be governed by the rules of possession at common law. 5 Bacon's Abr. 350, 356, and the cases there cited. And at common law, though the intent of the parties be ever so fully expressed and manifested in a grant or other deed, without the word *heirs*, a fee shall not pass. 6 Mod. 109; 2 Vesey 252; 1 Wilson 351; 2 W. Black.

3. There are no words in this deed, either technical or relative, that can raise a fee, and consequently, Abraham Vandegrift had thereby only an estate for life in the premises.

Let judgment be entered for the plaintiff.

McCULLUM *v.* COXE.

Discontinuance.

A plaintiff cannot discontinue, after a *bonâ fide* assignment of the debt, for a valuable consideration, to a third person.

THE jury were at the bar to try the issue in this case, when *Levy* moved to discontinue, in consequence of a power of attorney granted by the plaintiff for that purpose. But it was opposed by *Ingersoll*, in behalf of General Forman, to whom, for a valuable *consideration, the plaintiff had assigned the debt, and the defendant had undertaken to pay it to him accordingly. *140]

These facts being made to appear, THE COURT said they would not allow any collusive settlement between the original parties, to affect General Forman's *bonâ fide* assignment, and ordered the jury to be sworn. And MCKEAN, Chief Justice, observed, that where an action was brought under

such circumstances, it ought to be mentioned upon the docket, for whose use; a practice which had always prevailed, when he was at the bar.(*a*)

Morris *v.* De Mars.

Doctrine of respondeat superior.

It was ruled in this case, that a relation of a superior and inferior officer, does not, of itself, bind the former to pay the contracts of the latter, whether in the staff or line. But if the inferior officer had an authority to contract, and having obtained money for the use of the army, applied it accordingly, in such case, The Court inclined to think, that the superior would be liable for the debt, provided he had sufficient public funds to discharge it.(*b*)

(*a*) The beneficial interest vested in the assignee of a chose in action, is now fully recognised and protected by the courts of law, as well as chancery; and on the other hand, the assignee is made liable to set-off, and to the costs of the action, in the same manner as if it had been instituted in his name. In Canby *v.* Ridgway, 1 Binn. 496, the court permitted the defendant to suggest on the record, that the suit was for the use of a third person, and ruled him to pay the costs, the nominal plaintiff being insolvent. In a note to Corser *v.* Craig, 1 W. C. C. 428, it is said by Judge Washington, "Whether it is necessary that the interest of the *cestui que trust* should be mentioned in the writ and declaration, need not be determined, because, if such be the rule, it is sufficient, if it appears in any part of the pleadings." In Reigart *v.* Ellmaker, 6 S. & R. 45, it was held, that it was not necessary that the equitable interest should appear on the record. It seems a necessary consequence of this doctrine, that the assignor should be regarded in the light of a third person. Accordingly, it has been held, that where the nominal plaintiff takes no part in the suit, and the transfer has been *bonâ fide*, and before suit brought, he is not liable for the costs. Wistar *v.* Walker, 2 Bro. 171. And even where the assignment has been after suit, the nominal plaintiff has been frequently admitted as a witness, on payment of the costs. See Steele *v.* Phœnix Co. 3 Binn. 306; Browne *v.* Weir, 5 S. & R. 401; North *v.* Turner, 9 Id. 244.

(*b*) See Cook *v.* Irvine, 5 S. & R. 492; Schrayer *v.* Lynch, 8 Watts 453.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

SEPTEMBER TERM, 1785.

WOODS *v.* COURTER *et al.*

Evidence.—Ship's register.

THE register of a ship, or, in other words, an affidavit made by one of the defendants (who, however, was not in court, the return, with respect to him, being *non est inventus*), stating that the ship belonged jointly to him and other persons, being copied from the books of the naval officer, and certified under his seal of office, was allowed, after argument, to be read in evidence against the defendants.

And SHIPPEN, President, mentioned the case of the protest of a master of a vessel, which had been allowed to be evidence in his favor. (See *Nixon* v. *Long*, *ante*, p. 6.)

The defendant's counsel took a bill of exceptions to the opinion of the court, which, however, was never prosecuted, as the plaintiff eventually suffered a nonsuit.

Lewis, for the plaintiff. *Sergeant*, for the defendant.

*142] *MIFFLIN *v.* GASQUL.

Insolvent act.

A DEBTOR in confinement under a *magistrate's execution*, petitioned for his discharge under the insolvent laws. But he was remanded, because he had not applied before the adjournment; THE COURT observing, that it was already easy enough for debtors to get out of jail.(*a*)

(*a*) The proceedings in this case were under the act of 1729-30 (1 Sm. Laws, 181). Mr. Dallas afterwards, in a note to his edition of the State Laws (vol. 1, p. 258), stated the point thus, "A debtor in confinement under a magistrate's execution, presented his petition, *after the court had fixed the day for hearing insolvent debtors*, and had adjourned; but the application was held to be too late." See Henderson *v.* Allen, *post*, p. 149.

Dorrow, Assignee, *v.* Kelly.

Mortgage.—Tacking.

In Pennsylvania, a simple-contract debt cannot be tacked to a mortgage.

This came before the court on a case stated; in substance, as follows: On the 5th of March 1782, a mortgage was executed by Abel Kelly to Thomas Groome and his assigns, for securing the payment of 47*l.* 4*s.* with interest, on the 5th of March 1783. On the 9th of August 1782, the mortgage was assigned, for a valuable consideration, to John Dorrow; who sued out a *scire facias* to June term 1784, the day of payment being past. After the assignment, and before the *scire facias* sued, Kelly became indebted to the said Dorrow by notes and book-accounts, in divers sums, which still remain unpaid and payable.

Ingersoll, for the defendant, had obtained a rule to show cause why the proceedings on the *scire facias* should not be stayed, upon payment of the principal mortgage-money, interests and costs only; without payment of the subsequent simple-contract debts.

Lewis, for the plaintiff, showed cause, and stated from the books the law on the subject in England:—That it is presumed the subsequent simple-contract debts were contracted on the faith of the first security, though no special agreement for the purpose; that after the day of payment, the mortgaged premises are forfeited, in strict law; the privilege of redemption afterwards is a matter of equity, which shall be withheld, until the mortgagor does equity, by payment of all debts; that it prevents a multiplicity of suits, and effectuates substantial justice. And he contended, that in Pennsylvania, the chancery jurisdiction for redemption of mortgages, is transferred by the act of assembly to the common-law courts, which will also take care that he who claims equity shall do it. He cited a great number of cases, both as to the reasons and conclusions of the law. 3 P. Wms. 334; 3 Atk. 556, 630; 1 Chan. Cases, 97; 2 Vern. 286; 2 Chan. Cases, 98; 2 Vern. 177; Prec. Ch. 18; Gilb. Rep. in Eq. 104; Prec. Ch. 419; 16 Vin. 264–5; 1 P. Wms. 775–6; 1 Vern. 244; 1 Salk. 240; 1 Eq. Cas. Abr. 325; 2 Id. 594; Gilb. Rep. in Eq. 96; Max. of Eq. 1; Treatise of Eq. 89, 90.

Ingersoll read some authorities to show, that even in England, the law on the subject is not thoroughly settled. 2 Str. 1107; Eq. Cas. 359; 3 Bac. Abr. 651; Prec. Ch. 407, 419. But, conceding it to be *as stated by the opposite counsel, yet, he contended, that it is very different in Pennsylvania. Our act of assembly (1 Sm. Laws 59) puts mortgages on quite another footing:—For, 1st, Mortgagee cannot proceed on the mortgage, until one year expires after day of payment elapsed. 2d. Even then, a process is directed by the act, altogether different from that which is practised in England, and which does not go to vest the legal estate in the mortgagee. 3d. In fact, the mortgagee cannot, by any default of the mortgagor, however long, or reiterated, acquire a right to more than principal, interest and costs, for the amount of which he has an absolute and special lien on the mortgaged land, and for the payment of which the said lands are to be sold on execution (after judgment on the *scire facias*) in the usual way. And the act for acknowledging and recording of deeds, § 9, 10 (1 Sm. Laws 95), [*143

directs, under a heavy penalty, that upon payment made *as aforesaid*, the mortgagee, at the request of the mortgagor, shall acknowledge satisfaction on the margin of the record of the mortgage, which acknowledgment shall be a bar to all actions brought or to be brought on the mortgage, and shall for ever discharge, defeat and release the same. He then read the law of mortgages in England, from 2 Bl. Com. 157, and contrasted it with our act of assembly. In England, after day of payment past and foreclosure, the land is absolutely in the mortgagee, without any possibility of recall; it ceases to be a pledge, and becomes, to all intents and purposes, the absolute property of the mortgagee. In Pennsylvania, there is no such thing as foreclosure, the land mortgaged never ceases to be a pledge; a legal estate never vests in the mortgagee, nor can he, by any possibility, become owner of the land, unless he purchases under the execution. Hence, it must appear, that the reason of the English cases cannot apply in Pennsylvania. Relief is given to the mortgagor, in chancery, expressly because he is remediless at law; and therefore, they will grant the equity upon what terms they please. In Pennsylvania, the act of assembly precludes all necessity for such an interference. The privilege of redemption after the day of payment past is not properly speaking an equity, and therefore, the principle of the chancery cases cannot exist. Another reason why the English cases do not apply is, that, in England, real estate is not answerable for simple-contract debts; and therefore, chancery, in favor of such creditors, will cover them, where they have it in their power; but here, the simple-contract creditor can come on the land, even in the hands of the heir. If the rule should be extended to Pennsylvania, the most mischievous consequences would ensue to purchasers. It would be in vain for them to search the offices, to see to what amount a tract of land may be incumbered by mortgages; because, however accurate he may be in his calculation and comparison of the value of the land, with the amount of the mortgage-debts, an infinity of intermediate simple-contract debts may swallow up the whole difference.

Lewis observed, in reply, that the mischief suggested by his opponent
*144] need not be apprehended, because all the cases agree, that *the alienee of the mortgaged premises shall not be liable for more than the mortgage-debt, though it is otherwise with the mortgagor himself. As to the idea, that, in Pennsylvania, a mortgage is in nature of a common pledge, we find that the authorities extend even so far; *Demanbry* v. *Metcalf*, Gilb. Rep. in Eq. 104; s. c. Prec. in Ch. 419; it is the case of jewels pawned, which were not permitted to be redeemed, without payment of the pawnor's subsequent note of hand. And, with respect to the present point, the act of assembly has no other effect, than to extend to our law-courts the power of redemption which chancery has in England; for, if there was no such power, upon default on the day of payment, the mortgagor would be without remedy.

After consideration, the President delivered the opinion of the court as follows:

Shippen, President.—The case comes before us on a rule to show cause why the proceedings on a *scire facias* on an assigned mortgage, should not be stayed, on payment of the principal and interest due on the mortgage? It is contended, on the part of the plaintiff, that a subsequent debt having been

contracted with the assignee of the mortgage, the rule should not be granted, until such subsequent debt be first paid.

Being a court of law, we cannot take upon ourselves to act as a court of chancery. We have no power to foreclose the equity of redemption, or to impose terms upon a mortgagor applying to redeem. The courts of law in England have never done it, but under the act of parliament of 7 *Geo. II.*, c. 20, made for the more easy redemption and foreclosure of mortgages. Under this act, when an ejectment is brought for the recovery of lands mortgaged, if the mortgagor shall become defendant in the ejectment, and shall, at any time pending the action, pay the principal and interest money due on the mortgage, or bring it into court, such money shall be taken in full discharge and satisfaction of the mortgage, and the court shall discharge the mortgagor, and compel the mortgagee to surrender and re-convey the mortgaged premises. There is a case under this act which has not been cited at the bar, and which is rather fuller to the point, than any that have been cited. It is in 2 Barn. Not. 147, where "a rule, on the statute of 7 *Geo. II.*, to show cause why proceedings should not be stayed, on payment of the mortgage-money and costs, was made absolute; the lessors of the plaintiff, *assignees* of the mortgagee, insisted to be paid a bond and simple-contract debt due to themselves in their own right:—*Per Curiam:* a bond is no lien in equity, unless when the heir comes to redeem."

The courts of law, in this state, have, in some instances, adopted the chancery rules, to prevent the absolute failure of justice. But in this case, there is no necessity to usurp the powers of a court of chancery. We have a positive act of assembly, directing the mode of proceeding upon mortgages, entirely different from the *modes prescribed in England. This act [*145
expressly confines the remedy of the mortgagee to the recovery of the principal and interest due on the mortgage; and the proceedings under the law show the uniform construction of it. The *scire facias* is to show cause why the land should not be sold for payment of the principal and interest due on the mortgage: when judgment is obtained, the *levari facias* is to levy the principal and interest money only. There is no penalty, no judgment for a penalty, and we might as well refuse to stay proceedings in a suit on a single bill, until a subsequent debt was discharged, as in this case of a mortgage. Upon the execution in both cases, no more can be levied than the principal and interest.(*a*)

Rule made absolute.

(*a*) In Anderson *v.* Neff, 11 S. & R. 222, Judge DUNCAN said, "The law of England with respect to using satisfied incumbrances to protect purchasers, has no relation to mortgages in Pennsylvania. Redemption here is not a principle of equity, but a legal right. On the execution, no more can be levied than the principal and interest. These principles were settled in in Dorrow *v.* Kelly, 1 Dall. 144, and have prevailed invariably. There is no natural equity in tacking debts, and, where it interferes with the rights of others, it is most unjust."

Brown *v.* Scott *et al.*

Powers of referees.

Power of referees to consolidate several actions into one.

Rule to show cause why the report of referees should not be set aside. The facts were these: Four actions had been brought upon four promissory notes, and the parties, being willing to refer them, by a written agreement entered a fifth action on the docket, in order to take in another note, which had become due since the return of the preceding writs; and, accordingly, the whole were referred to persons nominated by the court; a rule for that purpose being taken out in each action. The parties were heard before the referees, and the report agreed upon, when a difficulty occurred, how to apportion the sum that was found due, or in what manner to make the report, if it was not apportioned. The referees, therefore, applied to a gentleman of the law, who advised them to connect the five rules, and make one general report, for the whole sum. Conformable to this advice, the following report was made: "We, the referees, appointed in the annexed five rules of court to hear and determine the matters in variance between plaintiff and defendants in the five several actions commenced by the former against the latter, do adjudge, that the defendants are indebted to the plaintiff 1301*l.* 3*s.* 11*d.*, and that the same ought to be paid accordingly." All the referees signed the report, and two of them attended in court, and gave testimony, that both parties were fully and patiently heard, and no objections were made on either side, to the mode of proceeding. Nor was there any suggestion, in the course of the argument, that the referees had acted with partiality, injustice, &c.

The motion was supported by *Ingersoll*, *Coulthurst* and *Heatly*, for the defendants, and they contended, that the report was neither certain, mutual nor final.

1st. For that the report says 1301*l.* 3*s.* 11*d.* is to be paid "accordingly" —accordingly to what? the mode of payment was a chief part of the dispute; and this was left *uncertain*.

*146] *2d. For that the report contains no direction that these notes should be delivered up; and as defendant cannot apply to a court of chancery, as he might, in England, for an injunction, they may still be circulated, and in the hands of a *bonâ fide* indorsee, so that the defendant may be compelled to pay the money over again; consequently, the report is neither *mutual* nor *final*. Cro. Jac. 315; Cro. Car. 112; 1 B. M. 304; 2 Id. 1224; Doug. 362; 5 Bac. 289, 313.

3d. The reports of referees, under the act of assembly, are acknowledged to be different from awards at common law; but in fact there is little difference between them and verdicts. If, therefore, these actions had been tried by a jury, and a verdict given similar to this report, no judgment could be given on it. Co. Lit. 227; Hob. 49; Str. 1024. For on what action can the court award execution, or how can they apportion the sums?

Wilson, *Sergeant* and *Sitgreaves*, for the plaintiff, were desired by the court to confine themselves to the *last* objection, as the *first* was not supported by testimony, and with respect to the *second*, it would overset too

many reports, were the objections of want of mutuality and not being final, upon such grounds, to defeat the report.

Taking up, therefore, the *third* objection, they argued, that the referees not being charged with partiality or misconduct, the objections to the form of the report, must find a cold reception with the court. If judgment cannot be entered upon the record as it stands, the court may interrogate the referees and divide the sum; or they may allow the plaintiff to sue out execution in one action, and release the others, or by their own authority, the court may interpose, and consolidate the actions. 1 Str. 420. But, in fact, it was contended, that the actions were already consolidated by the consent of the parties in the filed agreement; which is surely as much a part of the record, as a verdict, or a report; and by the submission of all matters in variance, the cause of action in each of the actions, is submitted in every one of them. Hob. 54; 12 Mod. 234; Str. 514; 3 Bac. Abr. 288.

Ingersoll, in reply.—Awards at common law differ so widely from reports under our act of assembly, that scarce any authority upon the subject of the first, is applicable to the second. In the first case, terms may be imposed, before the court will grant attachments; but here the report is equivalent to a verdict, and the sole point now is, whether, if it were truly a verdict, judgment could be entered upon it. It was not discovered until late in the argument, that the parties themselves had consolidated the actions; but upon the examination of the agreement nothing will appear that shows that intention, or produces that effect. It enumerates all the four actions, says that rules (in the plural) shall be entered in *these several actions*; and then there is a fifth action entered in this very agreement, which it is subsequently and separately agreed to refer. At least, therefore, this last action is not consolidated.

*To discontinue, or release four, and sign judgment upon the fifth, would be impossible, because the report expressly comprises more than the fifth action was brought for. And to call upon the referees, and by their assistance divide the sum, would be an illegal stretch of power, which was not to be apprehended from the court. Nor, as to the point of consolidation, has the court authority to do more than grant imparlances in some of the actions, to induce the party to consent that the trial of one shall decide the rest, which would be no relief in the present case. [*147

On the 15th of November, the President delivered the opinion of the court as follows:

Shippen, President.—The justice and fairness of the transaction, on the part of the plaintiff, is so obvious; and the consent of the parties to consolidate the actions, is so naturally implied from the whole of the proceedings, that my brethren (*a*) think the report ought to be confirmed.

For myself, I doubt the legality of it, because I do not see how it is possible to enter judgment upon the report, so as to avoid error. The consolidation of actions is intended to save expense, and might have been ordered by the court on motion;(*b*) but this agreement of the parties does not ap-

(*a*) Fleeson and William Rush, Justices.

(*b*) Merrihew *v.* Taylor, 1 Bro. App'x lxviii.; Rumsey *v.* Wynkoop, 1 Yeates 5; Prior *v.* Kelly, 4 Id. 128.

pear to me to amount to a consolidation, there being five several rules of reference in the five several actions; and though, indeed, the referees have undertaken to consolidate them, I much doubt their authority so to do. Instead of finding a gross sum due on all the notes, they might have found what was due on each note, and have reported the several sums on the separate rules of reference. However, as my brethren think the report ought to stand, let it be confirmed, and the plaintiff may make up the record as he thinks safest.(*a*)

Report confirmed.

Morris *v.* Tarin.

Damages on protested bill.

Where a bill of exchange had been protested for *non-acceptance*, and one of the drawers voluntarily paid the principal, and twenty per cent. damages, without waiting for a protest for *non-payment*, which, however, was subsequently made, it was *held*, that the drawer could not recover back the money paid as damages.

A Case was made in this cause for the opinion of the court, stating, that the defendant bought a bill of exchange drawn by Benjamin Harrison & Co. upon a house in France, which was presented to the drawee, in February 1784, and protested for *non-acceptance*. Before it was presented, however, the drawee had become insolvent, and an *arrêt* was issued by the French government, prohibiting the institution of suits against him for a certain time. When the bill became due (the *arrêt* still continuing in force), it was again presented, and, on the 5th of June 1784, protested for *non-payment*. Without any knowledge of the second protest, and without any suit or compulsion of law, the plaintiff, who was one of the partners of the company that drew the bill, repaid the defendant the principal, interest and charges, *with twenty per cent. damages*. But, afterwards, conceiving that he had paid the twenty per cent. damages in his own wrong, he brought this action to recover back the amount.

*148] *Sergeant*, for the defendant, contended, generally, that, an action lay against the drawer of a bill of exchange upon a protest for non-acceptance only. Cun. B. of Ex. 77, 83, 85; Bull. N. P. 269; Doug. 55. But that, at any rate, after a voluntary and deliberate payment, the plaintiff, in an action for money had and received, ought not to recover what the defendant might fairly accept.

Wilson, for the plaintiff, denied that the cases from *Cunningham* were

---

(*a*) In Groff *v.* Musser, 3 S. & R. 264, C. J. Tilghman, speaking of Brown *v.* Scott, said, "President Shippen thought that he arbitrators had no right to consolidate; and although he was overruled by his associates (who were not lawyers), yet I have always understood that his opinion has been held for law." The case of Hart *v.* James, in the supreme court, *post*, p. 355, confirms the opinion of President Shippen; and in Groff *v.* Musser, the supreme court reversed a judgment of the common pleas, on the ground that arbitrators, under the act of 1810, had no right to consolidate, without the consent of the defendant. "Whether the common pleas had power to direct an amendment," said C. J. Tilghman, "is not so clear." Judge Duncan was decidedly of opinion that they could not.

in point; disputed the authority of the case in *Buller*; and asserted that the decision in *Douglas*, being posterior to the revolution, was not law here. He contended, that the contract of the drawer was not that his bill should be accepted, but that it should be paid; that there was no breach until after the day of payment; that the protest must then be made, or, at least, within the days of grace, to entitle the holder to recover from the drawer; Ld. Raym. 743; and that the act of 12 *Wm. III., c.* 70, which gives the holder twenty per. cent. damages, mentions only bills returned unpaid, and not unaccepted. He urged strongly that the readiness of the plaintiff in taking up his bills, should operate in favor of the present action, which required only an equitable right to maintain it, and which it would, therefore, be incongruous to say, was more favorable for him, who put his creditor to the vexation and delay of a lawsuit, than to the man of honor and integrity, who, in his eagerness to do justice, had erroneously paid more than he was bound to pay. And he added, that the twenty per cent. damages, was imposed as a penalty, and no consideration paid for it by the purchaser of a bill, who, therefore, had no right in conscience to retain it.

The court held the case under advisement, until the 21st of November, when the President delivered their opinion as follows:

SHIPPEN, President.—This is an action for money had and received to the plaintiff's use. The facts are, that a bill of exchange was drawn on a house in France, by Benjamin Harrison & Company, of which company the plaintiff was one, in favor of the defendant, or some other person who indorsed the bill to the defendant. The bill being presented to the drawee, he refused to accept it, and a protest was made for non-acceptance. The bill, with the protest, was sent back, and the plaintiff being applied to for payment, voluntarily paid the defendant both principal and damages. This action is brought on an implied *assumpsit*, to recover back part of the money, to wit, the damages, as paid by mistake; the plaintiff contending, that to compel him to the payment of damages, there ought not only to have been a protest for *non-acceptance*, but likewise a protest for *non-payment*; and that having paid those damages, when by law he was not obliged to pay them, he ought in justice to recover the money back.

This is a liberal kind of action, and will lie in all cases where by the ties of natural justice and equity the defendant ought to refund the money paid to him; but where the party might with a good conscience receive the money, and there was no deceit or unfair practice *in obtaining it, [*149 although it was money which the party could not recover by law, this action has never been so far extended as to enable the party who paid the money voluntarily, to recover it back again.(*a*) The case of *Lowrey* v. *Bourdieu*, in Doug. 452, and that of *Farmer* v. *Arundel*, in 2 W. Black. 825, are full to this point.

In the present case, the defendant had presented the bill to the drawee for acceptance, and, on refusal, got it protested. Shortly after, and before the day of payment, an *arrêt* from the king of France prohibits the creditors of the drawee from suing him; upon which, the bill was immediately

(*a*) S. P. Irvine v. Hanlin, 10 S. & R. 220. And see Bogart v. Nevins, 6 S. & R. 369; Mathers v. Pearson, 13 Id. 258.

sent back, and Mr. Morris, without waiting for a protest for non-payment, voluntarily takes up the bill and pays the damages. A protest for non-payment, however, appears to have been made in France, before the money was paid by Mr. Morris, although he did not know it. The defendant had acted with fairness, and lain out of his money, and might with a good conscience receive the legal damages.

The point of law principally agitated in this cause, whether a protest for non-acceptance only, is sufficient to recover the money from the drawer, is not material to be determined in this action, because, as it is voluntarily paid, and the defendant might, consistent with justice, receive it, whether that point of law is for or against the plaintiff, we think, he cannot recover the money back.(*a*)

Judgment for the defendant.

Henderson *v.* Allen.

Practice.—Insolvency.

A Judgment had been entered, at the settlement of the docket, and the defendant was taken in execution on a *ca. sa.*, returnable to December term 1785. He now applied for the benefit of the insolvent acts, although he was not taken in execution, until the 26th of September, and his petition was presented subsequent to the application made by the debtors, on the third day of the term.

The Court said, that the practice under the act for the relief of insolvent debtors, was, that only those should be discharged, who made their application within the three first days of the term; for, otherwise, the court might be continually employed on this business, to the delay and detriment of every other.

The *Prothonotary* mentioned, on this occasion, that it was the constant practice to inquire, whether the writ of execution was returnable to the term at which the defendant applied for his discharge.(*b*)

The petition was dismissed.

Bankson, for the plaintiff. *Rawle*, for the defendant.

(*a*) It is now well settled, that if a bill of exchange be not accepted, an action will lie upon it against the drawer, before the time when it is made payable. Taan *v.* Le Gaux, 1 Yeates 204. But it was ruled in that case, that the holder was not entitled to the twenty per cent. damages, without a protest for non-payment; the act of 1700 (1 Sm. Laws 16) giving damages only in the case of bills "returned back *unpaid* with a legal protest." The act of 1700 was repealed by the act of 30th March 1821, which established a rate of damages for different parts of the world, but the expressions of the latter act are almost exactly the same as those of the act of 1700.

(*b*) See Mifflin *v.* Gasqui, *ante*, p. 142, and note.

COURT OF OYER AND TERMINER

AT PHILADELPHIA.

SEPTEMBER SESSIONS, 1785.

RESPUBLICA *v.* CALDWELL.

Indictment for nuisance.

It is no defense to an indictment for nuisance, in erecting a wharf on the public property, that it would be beneficial to the public.

THIS was an indictment for a *nuisance*, in erecting a wharf on the public property. The defendant offered witnesses to prove that the erection of the wharf had been beneficial to the public, and therefore, not to be regarded as a nuisance. But—

MCKEAN, Chief Justice, delivered the opinion of the court, that the evidence was inadmissible, for two reasons: *First*, Because it would only amount to matter of opinion, whereas, it is on facts the court must proceed; and the necessary facts are already in proof. *Secondly*, Because it would be no justification; for, on the same principle that the defendant might carry his wharf twelve feet, he could justify extending it farther; or any other man might excuse a similar intrusion. Suppose, for instance, a street were 60 feet wide, 12 feet might be taken off it, without doing any material injury to the public property, or creating any great obstruction to passengers; yet surely this will not justify any man's actually building upon, and assuming the property of the twelve feet that could be thus spared.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

DECEMBER TERM, 1785.

HOLLINGSWORTH *v.* HAMELIN.

Preference of commonwealth.

Where auditors, in a domestic attachment had made a dividend, without notice of the indebtedness of the defendant to the commonwealth in a bond for duties, it was *held*, that the commonwealth was not entitled to a preference

THE defendant having absconded, a domestic attachment issued against him, at the suit of the plaintiff, and the auditors, under that process, having advertised that all persons, who had demands, should send in their accounts, in a reasonable time afterwards, made a dividend among the creditors that filed their claims. Previously to issuing the domestic attachment, the defendant was indebted to the Commonwealth for duties upon a cargo imported, and having given bond to Sharp Delany (who was the collector, but not so named in the bond), a writ was thereupon issued against him, but was returned *non est inventus*. Of this, however, the auditors had no notice, until the dividend above mentioned was paid. Delany now claimed full payment. The matter was referred to the opinion of the court upon a case stated, which was argued, at an adjourned court, on the 11th of February 1785, by the *Attorney-General*, for the Commonwealth ; *Cox*, *Ingersoll* and *Sergeant*, for the creditors.

The COURT unanimously decided, that, on these facts, the Commonwealth was entitled to no preference.

---

*152] * LAZARUS BARNET'S CASE.

Foreign attachment.—Inhabitant.

What circumstances render a person an *inhabitant*, within the attachment laws.

LAZARUS BARNET having absconded, several foreign attachments were issued against him ; and afterwards, motions were made to set them aside, respectively, in favor of a domestic attachment, which had likewise issued against him. These motions were all founded upon the following affidavit :

"Daniel Benezet maketh oath, that on or about the 12th day of May

1783, the deponent let his house in Second street, Philadelphia, to a certain Lazarus Barnet; that the said Lazarus Barnet had resided therein, and followed the business of a merchant or storekeeper, from that time until about two weeks ago, when the said Lazarus absconded from the city, or secreted himself therein, as this deponent is informed. And this deponent further saith, that the said Lazarus Barnet appeared to him to be a married man, and having a family and servants in his house." Sworn the 11th of December 1784.

This case was argued on the 20th of January, by *Sergeant* and *Levy*, against the foreign attachments; and *Wilson* and *Ingersoll*, in support of them. On the 27th of the same month, the President delivered the unanimous opinion of the court.

SHIPPEN, President.—The question before us is, whether the *foreign* attachments, or the domestic attachment, issued against Lazarus Barnet, shall be established? The arguments in support of the foreign attachments, are chiefly founded on the third clause in the first act of assembly, which says that "no writ of attachment shall be granted against any person's effects, but such only as, at the time of granting such writs, are not resident, or residing, within this province;" and on that of the second act, which leaves non-residents to be proceeded against by foreign attachments, agreeable to the directions of the first act. And it is urged, that in the present case, it does not appear that Lazarus Barnet was resident or residing within the state, at the time of granting the domestic attachment, and, if he was not so resident, he is the object of the foreign attachment law.

Our opinion on this case, must be founded upon a connected view of the several acts of assembly relating to attachments; and these are the 4 *Ann.*, *c.* 28, the 9 *Geo. I.*, *c.* 3, and the 14 *Geo. III.*, *c.* 5.(*a*)

The object in passing the *first* act was, to subject the effects of absent debtors to the payment of their debts; as it appears by the preamble, that before that time, they were not equally liable with the effects of those persons who resided on the spot. Within the provisions of that act, three sorts of debtors were included:—1st. Those who never resided here, or whose actual residence was abroad. 2d. Those who had resided here, and had absconded, or otherwise removed; both of which are comprised in the general description of *non-residents* in the third clause of the act. And 3d. Those who *were still here, but were about to remove, without giving security to their creditors. In the *second* act, it is stated, "that [*153 divers irregularities and fraudulent practices had happened, to the injury of such creditors as were willing to accept an equal share of the effects of their debtors," and from these general expressions we are left to consider, to which of the foregoing descriptions of debtors, the preamble refers. It could not be the first; they residing abroad, and their effects coming here only occasionally, there was no great danger of fraudulent practices; and so it appears by the subsequent law still continuing the same remedy against them. With respect, however, to the other two classes, it was possible for a creditor to seduce his debtor to leave the province, or to entrap him into the commission of some other act, which brought him within the construction of

(*a*) Acts of 1705 (1 Sm. Laws, 45), 1723 (Id. 158), and 1774 (repealed).

the law, and to seize upon all his effects. The act, therefore, makes an entire new provision, with respect to both the latter descriptions of persons, and consolidates the two cases. It mentions nothing of persons absenting themselves *out of the province*, nor of persons refusing to give security; but enacts, generally, that all persons who had *absconded* from their usual place of abode, for six days, with design to defraud their creditors, and not distinguishing whether *in* the province, or *out* of the province; if they absconded with that design, they were persons whose effects the legislature intended should be divided among their creditors. To say, that they must be still remaining in the province, would be needlessly restraining the generality of the words of the act, which suggests that sometimes they may have left the province, by the words, "and had not left a clear estate in fee simple, within the province, sufficient to pay their debts."

The last clause of the second act provides, that "nothing in this act shall be construed to exempt the goods or effects of any person or persons, *not inhabitants* of this province, from being attached according to the directions of the former act." Here appears a designed variation from the expression used in the first act: it does not say persons not residing in the province, at the time of issuing the attachment, but, generally, persons not inhabitants of the province, and seems expressly meant to take in only those persons first described in the former act, persons who never resided here, or whose actual residence was in another country. A contrary construction would defeat the general intention of the legislature, as in most cases, those debtors who escape from their creditors, go out of the state. Nor is it material as to the policy of the act, whether he remains *in* the state, or goes *out* of it; he has committed an act similar to an act of bankruptcy, by absconding with a fraudulent design; and in that case, and in that only, is he the object of the second act.

The word "inhabitant" has a plain meaning. A person coming hither occasionally, as a captain of a ship, in the course of trade, cannot be called an inhabitant; nor does a person going from his settled habitation here, on occasional business to Boston, or any other place, cease to be an inhabitant.
*154] But a man who comes from *another place to reside among us, introduces his family here, takes a house, engages in trade, contracts debts, and, after some time, runs away with design to defraud his creditors, he ought surely to be considered such an inhabitant as not to be an object of the foreign attachment, but of the domestic one, and as a person whose effects should be seized for the benefit of all his creditors, and not of the first creditor who shall take out a foreign attachment, otherwise, there would be few objects for this equitable law to operate upon.

Such has been the uniform construction of the law of attachments in Pennsylvania from the year 1724, to the passing of the act of the 14 *Geo. III., c.* 5, which last act gives a legislative sanction to the preceding practice. We have, therefore, no hesitation in declaring our unanimous opinion, that the foreign attachments against Lazarus Barnet be dissolved.(*a*)

The foreign attachments dissolved.

(*a*) See Taylor *v.* Knox, *post*, p. 158; Lyle *v.* Foreman, *post*, p. 480; Kennedy *v.* Baillie, 3 Yeates 55; Nailor *v.* French, 4 Id. 241; Bainbridge *v.* Alderson, 2 Bro. 51; Redwood *v.* Consequa, Id. 62.

Case *v.* Hufty.

Practice.—Default.

In this case, it was ruled by The Court, that, to entitle the plaintiff to judgment by default, the service of a summons on the person of the defendant, as well as if left at his house, must be ten days before the return.(*a*)

Vienne *v.* McCarty, surviving Partner.

Foreign attachment.—Partnership.

The court will inquire into the cause of action, in the case of foreign attachments, and dissolve them if sufficient cause be not shown.

The separate creditor of a deceased partner cannot maintain an action against the surviving partner, for moneys which have come into his hands in that capacity.

After argument (by *Coxe*, *Wilcocks* and *Wilson*, for the plaintiff, and by *Ingersoll* and *Lewis*, for the defendant), the President delivered the opinion of the court in this cause.

Shippen, President.—The first point to be considered in this case, is, whether the court think themselves authorized to inquire into the cause of action in the case of attachments, as they do in cases of *capias*, where the defendant's person is taken into custody? The reason of inquiring into the cause of action on writs issued against the person, is to prevent a vexatious plaintiff from imprisoning the body of the defendant *without cause*. In the case of attachments, though the reason may not perhaps be so forcible, as the personal liberty of the defendant is more precious than his property, yet the abuse of the process of law may be as great, and the necessity of providing against a wanton and groundless seizure of the defendant's effects, as obvious. In the case of *specific articles* attached, a stranger's ship, or other effects, may be taken out of his hands, and detained for such a length of time as to ruin his voyage, and embarrass his affairs beyond redress. So, in the case of *debts* attached, his property may be locked up, his remittances prevented, and the injury nearly as great in the other case. The bail marked by an attorney, or *a malicious plaintiff, may be out of all bounds disproportioned to the debt; and if there was no way of [*155 examining into the justice or extent of the demand, a defendant might be at the mercy of the plaintiff, to be ruined at his pleasure. All these mischiefs may be prevented, without injury to any one, by an inquiry made by the court into the cause of action, in the same manner that it is every day done

---

(*a*) Whenever it appears, *on the record*, that the summons was not served ten days before the return, the supreme court will reverse the judgment. Fitzsimons *v.* Solomon, 2 Binn. 436; Morrison *v.* Wetherill, 8 S. & R. 504. But, *it seems*, from the last-mentioned case, that if the summons was returned, generally, "served," without stating the time of the service, the supreme court will presume that it was duly served, to entitle the plaintiff to judgment. The act of assembly requires that the declaration should be filed *five* days before the return of the writ; but in practice this is not attended to, and according to Duncan, J. in Morrison *v.* Wetherill, it is sufficient, if the declaration be filed at any time before judgment. As to the manner of serving the summons, see Bujac *v.* Morgan, 3 Yeates 258.

in cases of *capias*; and we think the spirit of the law, and sound reason, point out the necessity of such an interposition.(*a*)

The cause of action shown in this case, is a bill of exchange drawn by James Cummins, with a protest for non-payment, and this would undoubtedly be a sufficient cause of action against James Cummins, his executors or administrators; but to make it amount to a cause of action against William McCarty, the surviving partner of James Cummins, it being the separate debt of James Cummins, contracted before the partnership, something more must be shown. All that is shown is, that he has a sum of money in his hands, recovered in two actions, one against John Nixon, as administrator of James Cummins, the other against Mifflin and Butler, both sums recovered by McCarty as surviving partner of Cummins. This is an action at common law, und I am at a loss to find out upon what principle it can be supported. I have heard of no case which gives a creditor an action against the debtor of his debtor—there is no privity between the parties.(*b*) An attachment will lie against the debtor himself, and that attachment may be laid in the hands of a third person as garnishee; but to bring the action originally against that third person, is, I believe, without example, unless some particular lien appears on the goods or money in his hands; and no lien appears in favor of this creditor which does not exist in favor of every other private creditor of Cummins. Besides, there appears to have been a verdict of a jury, and a judgment of a court of law, upon the very point on which the plaintiff founds his demand. If the administrator of Cummins could not retain this money against the surviving partner (the administrator being the proper representative of all the creditors), how can a single creditor maintain an action for that very money?(*c*)

We are, therefore, of opinion, that no sufficient cause of action appears against the defendant, and adjudge, that the money and effects of the defendant be discharged from the attachment.(*d*)

(*a*) The right of inquiring into the cause of action, in cases of foreign attachment, is now firmly established, and the practice has been regulated by several reported decisions. As to the time in which the motion must be made, see Whiteside *v.* Oakman, *post*, p. 294; Penman *v.* Gardener, 4 Yeates 6; Miles *v.* McFarland, cited in Sergeant on Attachments, p. 138; Kearney *v.* McCullough, 5 Binn. 389. Upon the manner of showing cause, see Taylor *v.* Knox, *post*, p. 158; Redwood *v.* Consequa, 2 Bro. 78; Mollet *v.* Fonsera, 4 S. & R. 543; Elbridge *v.* Robinson, Id. 548.[1]

(*b*) S. P. King of Spain *v.* Oliver, Peters C. C. 288.

(*c*) See McCarty *v.* Nixon, 2 Dall. 65, 66, in note; McCarty *v.* Emlen, 2 Yeates 190; S. C. 2 Dall. 277; Knox *v.* Summers, 4 Yeates 477; Bell *v.* Newman, 5 S. & R. 78; Bank N. A. *v.* McCall, 3 Binn. 338; S. C. 4 Id. 371; Vanderwick *v.* Summerl, 2 W. C. C. 41.

(*d*) This case was brought before the court upon a doubt entertained by Mr. President SHIPPEN, of the power of a single judge to afford a remedy in the case of attachments, similar to that usually given in cases of arrests. In the latter case, the cause is still continued in court, by ordering a common appearance; but in attachments, the defendant being absent, cannot enter a common appearance, or give a warrant of attorney for that purpose. Therefore, all that can be done, where no cause of action can be

[1] The garnishee may rule the plaintiff to show cause of action. Erb *v.* Landis, 3 Clark 226. So, he may rule the plaintiff to issue a *scire facias*. Finch *v.* Bullock, 10 Phila. 316.

*Weaver v. Lawrence.

Replevin.

Practice in the action of replevin, in Pennsylvania.
Replevin issues in this state, wherever a plaintiff claims goods in possession of another.
Judicial writs, *de proprietate probanda*, do not issue here; but where defendant claims property in the goods, he gives security to deliver them, if, on trial, the property shall not be found in him.

Replevin. The defendant pleaded property and gave bond; upon which *Ievy*, for the plaintiff, moved for a writ *de proprietate probanda;* and after argument, on a rule to show cause why it should not issue, the President delivered the opinion of the court as follows:

Shippen, President.—In England, there are two kinds of replevin; *first*, by common law, when the writ issues out of the court of chancery: *secondly*, by the statute of Marlbridge, which enables the sheriff to make replevins, without writ, and then, having taken security, he proceeds on the complaint of the plaintiff, either by parol, or precept to his bailiff. In the latter case, the writ *de proprietate probanda* issues at once, upon claim of property; and being tried by an inquest, if it is found for the plaintiff, the sheriff goes on to make the replevin; but, if for the defendant, he forbears. This summary proceeding, with regard to the writ *de proprietate probanda*, is confined, however, to the case of a plaint in the sheriff's court, under the statute; for when replevins are at common law, no writ *de proprietate probanda* issues, until after the return of the sheriff on a *pluries* replevin; the original writ, or the *alias*, being only directory to the sheriff to make replevin, and proceed in the county court, and are not returnable process, as the *pluries* is, by having in it the clause of "*vel nobis causam significes.*" If, therefore, the *pluries* is returned into the king's bench or common pleas, with a claim of property by the defendant, a judicial writ, *de proprietate probanda*, may issue, returnable into either of those courts. But on this writ, if the sheriff's inquest find property in the defendant, the plaintiff is not concluded, being only in inquest of office; and he may either bring a new replevin, or an action of trespass against the sheriff, in which the question of property shall be finally tried. But when the parties have appeared *in banc*, and the defendant claims *property* on plea, no writ *de proprietate probanda* can issue at all, but the claim must be tried in court.

Having thus stated the law in England, we must now inquire, on what footing replevins are in Pennsylvania, and under what law they issue.

It is clear, that in this state there can be no replevin under the statute of Marlbridge, since there is here no such county court to enter plaint, as in England, nor any sheriff empowered by his own authority to make replevin; and, consequently, there can be no summary proceeding, as to the writ *de proprietate probanda.* With respect to writs of replevin at common law, these, likewise, cannot be issued in Pennsylvania, for want of a court of chancery, from which they might issue as an *original* writ. Hence, it was nec-

---

shown, is to dissolve the attachment, which it is only in the power of the court from whence the writ issues, to do.[1]

[1] See Swilkey *v.* Shaibley, 9 Lancaster Bar, 114. The affidavit of the plaintiff's cause of action is not amendable. Mylert *v.* White, 1 W. N. C. 626.

essary to make a law for ourselves, and this was accordingly done, in the year 1705, by an act of assembly, which directs, that "it shall be lawful *for the justices of each county, to grant writs of replevin in all cases whatsoever, where replevins may be granted by the laws of England, taking security as the said law directs, and make them returnable to the respective courts of common pleas, in the proper county, *there* to be determined according to law." (1 Sm. Laws, 44.)

*157]

This act seems then to have made a very considerable alteration in the proceedings in replevin: for, 1st. It does not recognise two kinds of replevin, one by plaint, and the other by writ. 2d. Replevins are made always returnable writs, and the parties' appearance required on the return: and 3d. They are directed to be *there* determined, that is, in the court of common pleas. As the proceedings are different, so has been the practice under the law; and in writs of replevin here (as in other cases), a summons to the defendant to appear, is always inserted, and a precise day given for his appearance. Nor is the writ liable to be defeated, by a claim of property, as it is in England; where that claim, as I have already observed, puts an end to the suit on the replevin, so that, if it is afterwards revived, it must be by the writ *de proprietate probanda*. But in Pennsylvania, the practice on a claim of property has been agreeable to the act of assembly; the suit goes on, and although the claim prevents the delivery of the goods to the plaintiff in replevin, yet, the defendant gives security to deliver them, if, on trial, the property shall not be found in him.(*a*) This practice, therefore, clearly supposes that the trial of property was intended, by the act of assembly, to be in the court of common pleas, and not elsewhere.

No writs *de proprietate probanda* have hitherto issued in this state. The summary writ, under the statute of Marlbridge, seems indeed to be the only one, which can, in most cases, be of real use, by the immediate intervention of an inquest to decide the claim of property; but, for the reasons before assigned, that cannot issue here. The *judicial* writ too, if it could issue agreeable to our act of assembly, would rather occasion delay, than expedite the cause, and could, in very few instances, answer the ends expected from it. For, *first*, it cannot issue until after the return of the *pluries* writ of replevin, when the time would, perhaps, be elapsed, in which it would be of most importance to determine the question of property: and *secondly*, if it should issue and be executed, it would not be final, in case the property

---

(*a*) In Hocker *v.* Stricker, *post*, p. 225, it was *ruled*, that the sheriff ought to allow a reasonable time for the defendant to find security, and if he refused to give time, he could not justify in an action of trespass. The bail given by the defendant, it has been held (Miller *v.* Foutz, 2 Yeates 418), are liable to the full amount of the *penalty* of their bond, which is generally in double the value of the goods. On the issue under the plea of property, the defendant may show either a general or special property in himself. Murray *v.* Paisley, 1 Yeates 197. And the jury, if they find for the plaintiff, may assess damages for the detention, beyond the value of the property. Warner *v.* Aughenbaugh, 15 S & R. 1.[1]

[1] The giving of a property bond changes the title, and turns the plaintiff's right into a chose in action. Fisher *v.* Whoollery, 25 Penn. St. 197; Rockey *v.* Burkhalter, 68 Id. 221. Therefore, a clause providing for a return of the goods, if adjudged by law, is illegal; the judgment is only for damages and costs. Chaffee *v.* Sangston, 10 Watts 265; Moore *v.* Shenk, 3 Penn. St. 13; Fisher *v.* Whoollery, *ut supra*.

should be found for the defendant, being only an inquest of office, and the plaintiff still entitled to a new replevin, or an action of trespass against the sheriff.

In England, most cases of replevin are founded on previous distresses for rent; and it is even said in some books, that it lies in no other. But here, it issues, wherever a plaintiff claims goods in the possession of another;(*a*) and accordingly, things of great value, as ships, are frequently replevied. If, therefore, a hasty change of possession should take place by a sheriff's inquest, it might be attended with great mischiefs; and vessels loaded, and ready to sail, might be ordered out of the possession of those who have long held them, although able and willing to give security to the value.

*On the whole, after the present practice on replevins has been of so many years standing, and seems founded on a law of our own, we think, it would be improper to make such an alteration, as would be occasioned by issuing judicial writs *de proprietate probanda*. [*158

The rule discharged.

Taylor *v.* Knox *et al.*

Finlayson *v.* Knox *et al.*

Foreign attachment.

What circumstances make a person an inhabitant, under the attachment laws.
An affidavit of debt, sworn to before the Lord Mayor of London, was held to be sufficient.

Foreign Attachments. In these cases, rules had been obtained to show cause of action, and why the attachments should not be quashed.

On the argument, the garnishee, Henderson (who was also a copartner with the defendants), produced several witnesses, by whose testimony the following facts were established: That David Knox came to Philadelphia in the spring of 1784; that he brought furniture with him, hired a dwelling-house and store, and professed an intention "to lay his bones here." That he went to Virginia, in February 1785,(*a*) and sailed thence to England, in

(*a*) s. p. Shearick *v.* Huber, 6 Binn. 3; Stoughton *v.* Rappalo, 3 S. & R. 562. Woods *v.* Nixon, Addis. 134. The rule is not universal, however, in its application; since the act of 1779 (1 Sm. Laws, 470) declares all writs of replevin issued for goods taken in execution by any sheriff, constable, collector of taxes, or other officer acting under the authority of the state, to be irregular and void; which has been held to extend to a replevin for goods seized for a tax imposed by the city of Philadelphia. Stiles *v.* Griffith, 3 Yeates 82.[1] But, notwithstanding this act, replevin may be maintained against the sheriff's vendee, to recover chattels wrongfully taken in execution and sold. Shearick *v.* Huber, 6 Binn. 3. It has been held also, that replevin cannot be maintained for slate or coals taken from a quarry, where the plaintiff is not in the actual exclusive possession of the land. Brown *v.* Caldwell, 10 S. & R. 114.[2]

(*b*) The evidence was, that Knox came to Philadelphia, about the middle of April 1784, and remained here, until December following, when he proceeded to Virginia,

[1] And see Pott *v.* Oldwine, 7 Watts 173; Green *v.* Kenney, 6 W. N. C. 574.

[2] s. p. Powell *v.* Smith, 2 Watts 126; Cromelien *v.* Brink, 20 Penn. St. 522; Roberts v. Dauphin Deposit Bank, 19 Id. 71. But see Snyder *v.* Vaux, 2 Rawle 423; Coomalt *v.* Stanley, 3 Clark 389; Young *v.* Herdic, 55 Penn. St. 172; Green *v.* Ashland Iron Co., 62 Id. 97; Wilkinson *v.* Stewart, 85 Id. 255.

consequence of receiving intelligence of some misconduct of another partner named Cowan, who resided there, and had never been in America. That during his absence, and at the time of laying the attachments, the copartner, now garnishee, continued in possession of the house in Philadelphia, with much the same establishment of servants, &c., but after the attachments were laid, he broke up house-keeping. That David Knox was a single man, and it was not known, whether he had taken the oath of allegiance to this state, or not.

The plaintiffs, to show their cause of action, produced affidavits of accounts from their respective books, sworn to before the Lord Mayor of *London*.

The question being argued by *Ingersoll* and *Rawle*, in support of the motion, and by *Lewis* and *Wilcocks* against it, the President, at an adjourned sitting, on the 15th of February 1786, delivered the opinion of the court.

SHIPPEN, President.—The first point to be decided is, whether the foreign attachments ought not to be dissolved, on the proofs given of Knox's being an inhabitant of Pennsylvania, at the time they issued?

We would avoid laying down any general rules as to what will, or will not, make a person an inhabitant, within the attachment law, lest cases should hereafter happen, which might come within those general rules, but were not in the contemplation of the court, in the particular case before them. We think, however, if any general rule was made, it would be reasonable, and very consonant to our laws and constitution, that the person's residence here, to make him *an *inhabitant*, should be so long as to give him the rights of citizenship, to wit, for twelve months. And we should have no hesitation in laying this down as a rule, if it were not for those cases of dispute which may arise between creditors on a *domestic* attachment, and creditors on *foreign* attachments, where it may frequently happen, that the debtor's residence may be less than twelve months, and yet he may, and ought to be an object of the domestic attachment law, so as to have his effects divided among all his creditors, and not swept away by the first creditor who takes out a foreign attachment.(*a*) But in cases where a stranger comes among us, and remains here for a short time, and then goes away under such circumstances, as not to make him an object of the domestic attachment, it will always have considerable weight with us, that he has not resided here for twelve months.[1]

*159]

In Knox's case, his residence was only eight or nine months; the family he left behind him, does not appear to be of a kind to denote an unequivocal continuation of his residence, being probably no more than was sufficient for his partner, Henderson's, own accommodation as a single man.

The second question is, whether there has been such proof of a debt due, as is sufficient to show a cause of action?

---

whence he sailed for England, having declared his intention to return the ensuing spring. The attachments were issued to September term, 1785.

(*a*) See Lazarus Barnet's case, *ante*, p. 152; and the note to that case.

[1] See Fuller *v.* Bryan, 20 Penn. St. 144; Pfoutz *v.* Crawford, 46 Id. 420; Reed's Appeal, 71 Id. 378; Hartz *v.* Asahl, 1 W. N. C. 282.

And here it will be proper to mention the reason and occasion of making the rules with regard to proofs necessary for holding to bail on writs of *capias*. When I came into this court, I found a practice had lately taken place, of requiring proofs of the debt, similar to those required by the statute of 12 *Geo. I.*, so as to disable absent plaintiffs from holding defendants to bail, for want of a positive affidavit, before one of the judges of this court, of a subsisting debt. I considered this practice as not founded in law, and as tending to injure the credit of the country. That it was not founded in law, I took to be clear, from the words of our act of assembly, made shortly after the revolution, extending only such of the statute laws of England as had theretofore been in force in Pennsylvania. The act of 12 *Geo. I.* was certainly not in force, nor ever practised under, before the revolution. But as the judges who had sat here before me, thought there was good reason to keep up a kind of reciprocity between England and us, upon this subject, and not being willing to relax the rule totally, it became necessary, in order to preserve an uniformity of determination in the several judges of the court, to settle another mode, so as to avoid extending an act of parliament, by their authority, which had not been extended by the legislature, and yet not to give the inhabitants of that country the same easy method of proving their debts in England, before the Lord Mayor, or other magistrate there, which had been practised, previous to the revolution, under their own acts of parliament. A middle way was, therefore, struck out; and a signature of the party to some instrument of writing, or some letter, or acknowledgment *of the debt, was made necessary to be superadded to the usual probate made before the war. This rule, however, affects the inhabitants of other countries as well as England; and it may possibly be found necessary, at some future time, to make an alteration in it, more conformable to the general law on those subjects.(*a*) [*160

But as, at the time of making the rule, we had no eye to any other kind of process than writs of *capias*, and it was expressly confined to them, in favor of personal liberty, we do not think it should be extended to other cases not then within our view. In cases of attachments, therefore, we think it safest to follow the law as we find it in our books, before the statute of 12 *Geo. I.* And as it appears by the case in 8 Mod. 323 (*Walrond* v. *Van Moses*), that an affidavit of a plaintiff, before a notary-public in Holland, was deemed sufficient to hold the defendant to bail, we think the like affidavit, in this case, should be sufficient for the same purpose.(*b*)

Motion to dissolve the attachments discharged.

(*a*) See the remarks by Chief Justice TILGHMAN upon the opinion of President SHIPPEN in the text, reported in Walker *v.* Bamber, 8 S. & R. 61. The time which Judge SHIPPEN anticipated, when it would be found necessary to make an alteration in the law respecting foreign affidavits, was supposed by C. J. TILGHMAN to have arrived in 1822; and it was then adjudged, that an affidavit of debt, made before a justice of the peace in England, was sufficient, without other evidence, to hold the defendant to bail. The same point was determined in the District Court of Philadelphia, in Baker *v.* Croft, MS.

(*b*) Upon the subject of the affidavits to sustain a foreign attachment, see the note to Vianne *v.* McCarty, *ante*, p. 154.

*MARCH TERM, 1786.

HOLLINGSWORTH *v.* LEIPER.

Arbitrators.

It is not a valid exception to a report of referees, that they heard a witness interested in the event.

A RULE had been obtained, to show cause why the report of referees should not be set aside, on the ground of their having heard a witness interested in the event of the suit; and, after argument, the President pronounced the decision of the court.

SHIPPEN, President.—The determination of causes by referees, under a rule of court, has become so frequent and useful a practice, and is attended with so many advantages towards the summary administration of justice, that it would be extremely mischievous to shake their reports, by captious objections, where the substantial rules of justice are not violated. The merits of the cause are solely submitted to them, as judges of the parties' own choosing, and are not afterwards inquired into by the court, unless there should appear a plain mistake of the law or fact.

*162] *As to the forms of their proceeding, both parties should have an opportunity of being heard, and that in the presence of each other, that they may be enabled to apply their testimony to the allegations. The witnesses, on both sides, are likewise to give their evidence in the presence of the parties, that they may have an opportunity of cross-examining them.(*a*) No surprise is permitted, such as refusing the parties a reasonable time to bring forward their witnesses, or refusing to hear them when they are brought.(*b*) These rules, or similar ones, are founded in natural justice, and are absolutely necessary for the due administration of justice in every form whatever.

As to the kind of evidence which the referees may hear, there always has been, and must necessarily be, in this kind of tribunal, a very great latitude. The parties, generally unassisted by counsel, are permitted to relate their own stories, and confront each other; their witnesses are heard, even without an oath, unless the contrary is stipulated, or the referees require it. Books and papers are inspected and examined by them, without regard to their being such as would be strictly evidence in a court of law. And this practice being known to both parties, before they agree to the reference,

---

(*a*) Thus, in Hagner *v.* Musgrove, *ante*, p. 86, a report of referees was set aside, because they had ordered the parties to withdraw, and examined the witnesses out of their hearing. And see Chaplin *v.* Kirwan, *post*, p. 187; Passmore *v.* Pettit, 4 Dall. 271.

(*b*) Thus, where referees had refused the defendant time to obtain testimony from a foreign place, and there was no reason to suppose that the object in asking it was mere delay, the report was set aside. Passmore *v.* Pettit, 4 Dall. 271. But to entitle a party to further time, to produce testimony, he must show them what it is, why he is not able then to produce it, and that he expects to be able to produce it in a reasonable time. A naked allegation that he desires further time, is not sufficient. Latimer *v.* Ridge, 1 Binn. 458.

and the advantages arising from it being mutual, there seems no just reason to complain of it.[1]

In public trials, in courts of law, the judges sit to superintend the evidence; no interested witnesses are, in general, permitted to give evidence to the jury; but referees occupy the office both of judge and jurymen; their discretion, therefore, must necessarily be much relied on, and as they are generally unacquainted with the artificial rules of law, they must be guided principally by their own reason. If we were once to set aside a report, because the referees had heard an interested witness, we should open a door for such a variety of objections, that scarcely a single report would stand the test. Papers not formally or legally proved, or hearsay evidence admitted, would be as fatal to reports, as the admission of interested witnesses, being equal violations of the rules of evidence.

Rule discharged.

Ogden *v.* Ash.

Marine insurance.

A policy of insurance warranted, that "orders will be given that the ship shall not cruise:" *held*, that it was necessary that *express* orders should be given to this effect, and that it was not sufficient, that such directions might be *implied* from the instructions to the master.

This was an action upon a policy of insurance on the ship Brothers, which came before the court upon a case stated, wherein the single question was, whether a warrant inserted in the policy, had been complied with on the part of the insured, or not? After argument, the President stated the point, and delivered the opinion of the court.

Shippen, President.—The policy in this case, is on the outward-bound voyage, wherein it is warranted "that orders will be *given that the ship shall not cruise." Whether such orders have, or have not, been given, is the question before the court. [*163

The orders which were given, are produced. They consist of instructions which, in the former part, relate to the outward-bound voyage, and in the latter, to an intended cruise for two or three months, after the outward-bound voyage, which was the sole object of the insurance, should be completed.

The instructions with regard to the outward-bound voyage, begin with an account of the cargo, to whom it is consigned, and give the usual directions in mercantile voyages, how it is to be disposed of, and how the proceeds shall be applied. The master is expressly directed not to touch at any port to the southward of Philadelphia, lest the insurance should be endangered, but no mention is made of a cruise, except that the goods are to be sold for the purpose of fitting her out afterwards for a cruise.

It is, however, contended, that sufficient appears on the face of the instructions, considering the unwarlike condition of the vessel, and the intent of the voyage, to show, that, though no express direction is given not to

---

[1] Where the parties manage their own case, without the assistance of counsel, the court will not be nice in scanning the proceedings before the arbitrators. Fairchild *v.* Hart, 1 Phila. 227.

cruise, yet such an implied direction is given, as will satisfy the words of the warranty.

The general intention of the owners, to be collected from the instructions, is sufficiently clear, that they did not mean to give the master a power to cruise. But what was the intention of the parties in making the warranty? Was it, that such orders should be given as, by construction or inference, should show *that* to be the intention of the owners? or, was it not, that the master should be directed, in express terms, not to cruise?

If the warranty had been, that no orders should be given to cruise, or that he should not be empowered by his orders to cruise, these instructions would certainly have been a compliance with the warranty; but the warranty is not negative, that he should *not* have orders to cruise, but positive that he should have orders not to cruise. And in whichever way the warranty had been expressed, if the master had cruised, and the vessel by that means had been lost, he would have been answerable. So that the responsibility of the master is not any rule to govern the construction of the policy, because if he had cruised, without orders, he would have been equally liable, as if he had cruised contrary to express orders. The underwriters have stipulated that more should be done, than would barely make the master answerable for cruising. What their reasons were, we can only conjecture; it might be supposed, that if the orders were silent as to his cruising, he might be tempted, by an apparent prospect of gain, to do that, which he would not dare to do, in the face of express orders. It is well known, that there have been many masters who have not scrupled to break orders which were plain and express; but there are many more, who, when their orders are loose or silent, or discretionary, have run the risk of violating the spirit of them, and relied upon the generality or silence of their orders, to justify them to their owners.

*164] *In the present case, the condition of the vessel did not preclude the possibility of cruising. She mounted sixteen guns, she had leave, by the terms of the policy, to call at Beaufort for men, she was intended to be a cruising vessel, after the outward-bound voyage was completed, and it might not be an unreasonable suspicion in the underwriters, that the master, unless expressly restrained, might be tempted to cruise in the outward-bound voyage. Whatever their reasons were, the underwriters had certainly a right to make it a part of their contract; without it, they might have refused to insure at all, or they would perhaps have demanded a higher premium; and therefore, being stipulated, the owners should have complied with it.

These warranties in policies of insurance are required by law, and by the constant usage of merchants, to be strictly complied with; they are generally expressed in a few words, but where they are plain and clear, it would be of dangerous consequence to this useful branch of mercantile business, to introduce a loose construction of them.

We are of opinion, upon the case stated, and a view of the policy and orders, that the warranty has not been complied with, and that judgment should be given for the defendant.

Judgment for the defendant.(*a*)

(*a*) See Calbraith *v.* Gracie, 1 W. C. C. 219; Craig *v.* U. S. Ins. Co., Peters C. C. 416; Mackie *v.* Pleasants, 2 Binn. 371.

MARRIOT *et ux v.* DAVEY *et al.*, EXECUTORS.

Action for legacy.

A settlement of an administration account by referees, on a citation before the register, *held* not to be conclusive, in an action for a legacy.

THIS was an action brought by a residuary legatee under the act of the 12 *Geo. III., c.* 16 (1 Sm. L. 333), to which the defendant pleaded *fully administered.* The plaintiff, thereupon, moved for the appointment of auditors; but the defendant objected, because his account had been already left, by consent, to referees, on a former citation before the register of wills, &c.

THE COURT, however, determined, that the former settlement was not conclusive; and that, by the words of the act, it was intended, new auditors should be appointed, *ex tempore*, upon the plea of want of assets.(*a*)

Rawle, for the plaintiff. *Sergeant*, for the defendant.

STOTESBURY *v.* COVENHOVEN.

Practice.—Depositions.

ON an affidavit that the defendant was in confinement, and that material witnesses in his favor were about to leave the state, THE COURT granted a rule to take their depositions, although the writ was not returnable until next term.(*b*)

SOMERS *v.* BALABREGA.

Authority of an attorney.

IT was ruled in this case, that an attorney's agreement to refer, binds his client.(*c*)

(*a*) In Kohr *v.* Fedderhaff, 4 S. & R. 248, it was *held*, that a settlement of an administration account, in the orphans' court, was not conclusive, in an action for a distributive share. So, in Miller *v.* Young, 2 Id. 518, it was *held*, that a settlement in the orphans' court, made *after* the commencement of the action, which was for a legacy, was not conclusive upon the plaintiff; but the court declined to decide whether such settlement would have been conclusive, if made *before* the commencement of the suit. See also, as to the effect of such settlements, McCullough *v.* Montgomery, 7 S. & R. 31; McGrew's Appeal, 14 Id. 396; Sutton *v.* Connelly, 1 Bro. app'x lxiv.; McPherson *v.* Cunliffe, 11 S. & R. 431; Blount *v.* Darrah, 14 Id. 184, in note.

(*b*) In Gilpin *v.* Semple, *post*, 251, the court seemed to doubt its authority to grant a rule to take depositions, before the return of the writ. The practice in the courts of Philadelphia, however, has been uniform, in support of the authority. See 2 Dall. 78, 1 Yeates 404.

(*c*) An attorney on record is authorized (said C. J. TILGHMAN, in Huston *v.* Mitchell, 14 S. & R. 309), "to do such things as pertain to the conducting of a suit." He has a right to enter into a reference, but, strictly speaking, no right to make a compromise. And it was *held*, in the case cited, that the attorney of the plaintiff, in an action on the case to recover the purchase-money of a tract of land, had no right to enter into an agreement, by which the land was to be taken back, instead of the money. But see Lynch *v.* Commonwealth, 16 S. & R. 369, where it is said, that the authority of an attor-

ney at law, with respect to the business of his client, is more extensive in this state than in others, and that "the attorney is, in some degree, the agent as well as lawyer of the plaintiff," and it was adjudged, that his authority did not cease with the judgment.[1]

[1] An attorney has power to refer his client's cause to arbitrators, with an agreement that their award shall be final. Wilson *v.* Young, 9 Penn. St. 101. So, he may enlarge the jurisdiction of arbitrators, appointed under the compulsory arbitration law, to all matters in variance between the parties, and waive the right of appeal. Bingham *v.* Guthrie, 19 Penn. St. 418. An attorney has power to submit a question of boundary to arbitrators chosen in the suit. Babb *v.* Stromberg, 14 Penn. St. 397; Rowland *v.* State, 58 Id. 196; Evans *v.* Kamphaus, 59 Id. 379. But he cannot compromise the rights of his client, by agreeing to enlarge the powers of an auditor over a claim, not within the scope of the powers originally conferred on such auditor. Willis *v.* Willis, 12 Penn. St. 159.

SUPREME COURT OF PENNSYLVANIA.

APRIL TERM, 1786.

SLIVER, Plaintiff in error, *v.* SHELBACK.

Infancy.

The appearance of an infant to a suit brought against him, is not a judicial act, but will be reversed on error, after he attains the age of twenty-one.

THIS was a question on a writ of error, brought to reverse a judgment in the common pleas of Philadelphia county, against the plaintiff in error, when within age. The record of the court below stated, that the defendant (now plaintiff) appeared in person, imparled to the next term, and then appeared and said nothing; wherefore, &c. The plaintiff attained his full age, before he brought the writ of error.

Levy, for the plaintiff in error, cited 8 Mod. 185; Rep. temp. Hardw. 104, 376; 1 Bl. Com. 465; Cro. Eliz. 569, 818; Lill. Ent. 252; 3 Bac. Abr. 149. But, as his arguments were afterwards admitted, and repeated by the court. it is unnecessary to insert them here.

Lewis, for the defendant in error. Infancy must be tried by inspection, 3 Bl. Com. 331. By the record, it is stated, that the plaintiff in error appeared twice; and the court might then have tried the question of infancy, by inspection, if he had suggested it; so that he is not, at this time, entitled to be relieved. 3 Bac. Abr. 124, 134; 3 Bl. Com. 331. In all judicial process, the error must be reversed, before twenty-one years are attained, for what is done in court, though not for what is done *en pais:* as, in the latter case, a different mode for the trial of infancy is adopted, to wit, an inquest; *3 Bac. Abr. 134, 5, 6; and that may be done either within, or at full age. 9 Vin. 377; Co. Litt. 280. [*166

By MCKEAN, Chief Justice.—*Nil dicit* is not a judicial act; but *cognovit actionem* would have been so.

Lewis.—True; but the giving judgment upon *nil dicit* is a judicial act; and when he says nothing, there is the greater reason for the inspection of his age, in order to protect him, who evidently knows not how to protect himself. But how can the court ascertain the truth of what is alleged? Not by the verdict of a jury, for this is a judicial act; nor by the inspection

of the party, for he has now attained his full age; it can only be done by the record.

Lewis admitted, however, upon a question being put to him, that by the rejoinder in error, the infancy, which was assigned for error, was acknowledged; but he relied upon the impossibility of obtaining relief for a judicial act, done *diens ætatem*, by a writ of error, *post plenam ætatem*.

The Chief Justice delivered the opinion of the court, in substance as follows:

McKean, Chief Justice.—At the common law, there could be no appearance in any suit, real, personal or mixed, whether as plaintiff or defendant, but in proper person; except where the King, by virtue of his prerogative, granted his writ for an attorney; and where an infant appeared to defend a suit by his guardian. The statute of *West. II.*, *c.* 15, declares that if an infant is eloigned, so that he cannot sue personally, his next friend shall be admitted to sue for him; and c. 10 of the same statute, enables all persons of full age to sue and defend suits by attorney.

But the appearance of an infant to a suit brought against him, is not a judicial act. The appointment of a guardian to defend the suit; and the taking his examination, when a fine is to be levied, a recovery to be suffered, or a statute staple, &c., to be acknowledged, are judicial acts. Most clearly, however, the appearance in this case, is error.

The authorities cited by the counsel for the defendant in error, to show, that after his full age, the party cannot take advantage of his previous infancy, appear to be restricted to real actions, and to fines and recoveries, which are, in their operation, mere modes of assurance. But we are, likewise, clearly of opinion, that in other cases, a judgment against an infant may be reversed after *full age*, and that the fact must be tried *per pais* and not by inspection. Moore 460; Hardwicke's Cases 104; Hetly 65.(*a*)

Let the judgment below be reversed.

---

*167] *Pirate, *alias* Belt, *v.* Dalby.

Slaves.

The civil law rule, *partus sequitur ventrem*, is the law of this country, in regard to domestic slavery.

Since the act for the gradual abolition of slavery, a number of persons have formed a society in Philadelphia, for the purpose of relieving those of their fellow-creatures, who are held in illegal slavery; and this action is owing to that institution.

The plaintiff, being the supposed issue of white and mulatto parents, attended the defendant to Philadelphia, in the autumn of 1784, and presented so pur) a complexion, that the attention of the society was excited, and a writ of *habeas corpus* taken out, at their instance.

The boy's right to freedom was first argued before Mr. Justice Bryan,

---

(*a*) The same points arose in Moore *v.* McEwen, 5 S. & R. 373, where it was determined, that the appearance of an infant, by attorney, was assignable for error, and that the plea, *in nullo est erratum*, admits the fact of infancy.

and the next day, before the same judge and the chief justice, at their chambers; when, the facts being disputed, the chief justice advised the counsel to throw the case into the form of an action *de homine replegiando;* and recognisances to appear being entered into on both sides, a declaration was filed of September term, 1784, stating that "the defendant Dalby had taken and kept captive the plaintiff, Francis Belt, whereby the said plaintiff is injured," &c. To this the defendant pleaded, that the plaintiff was his slave, and the plaintiff replied—that he was a free man, *absque hoc*, &c.; rejoinder and issue.

Upon the trial, which was by a struck jury, it was given in evidence, that the plaintiff was born in Maryland, of an unmarried mulatto woman; that the grandmother and the mother of the plaintiff are now, and always have been, slaves; that he was purchased by the defendant's agent, and that the sale was then in dispute in law in Maryland; that the plaintiff had not been six months in Pennsylvania, when the *habeas corpus* was brought; and the plaintiff himself was shown to the jury, that they might, from his appearance, draw some conclusion, that he was, at least, on one side, the issue of white parents.

Mifflin, for the defendant, having proved, by the laws of Maryland, that the boy was a slave in that state, contended, that the *lex loci* must determine this, as well as other personal and mixed actions; and for that doctrine, cited, among many other authorities, 1 P. Wms. 420; Prec. in Chan. 207. He said, that the rule *partus sequitur ventrem*, was founded on reason and the law of nature, and as applicable in other countries as in Maryland; 1 Puffend. 599. 693. Just. Inst. lib. 13, § 4; and he observed, that even in Pennsylvania, the legislature had taken notice of other than negroes and mulattoes, to wit, Indian slaves. 1 Dall. Laws, 62.(*a*)

The *Attorney-General* and *Lewis*, argued for the plaintiff. They said that, in Pennsylvania, there was no positive law for slavery; though as the acts of assembly took notice of three sorts of slaves, negroes, mulattoes, and Indians, they admitted, that, by a reasonable construction, this might be rendered tantamount to an express toleration. *But they contended, [*168
that even under this admission, the maxim which declares that *expressio unius est exclusio alterius*, must be applied to the plaintiff's case, and consequently, as he was neither an Indian, a mulatto, nor a negro, he cannot be enslaved by mere implication. With respect to the *lex loci*, they allowed its force in regulating contracts; but insisted, that it could never be extended to injure a third person, who was not a party to the contract; which the plaintiff had not been in the present instance; and having thus answered the adverse arguments, they laid down four propositions, on which they meant to rely.

1st. That, however the case may be at civil law, by the common law, the issue follows the condition of the father. 2 Black. Com. 390; Fortesc. de Laud. 98, 103; Litt. § 187, 188; 11 State Trials, 343.

2d. That a bastard, being *nullius filius*, is free; for, he who can gain

---

(*a*) Act of 1705, entitled, "An act to prevent the importation of Indian slaves," which may be found in the 1st vol. of Mr. Dallas's edition of the Laws, p. 62; but is said by Mr. Smith, to be "obsolete," and therefore omitted in his edition.

nothing by inheritance, ought to lose no part of his natural freedom, by relation to his progenitors. 2 Bl. Com. 94; Co. Lit. 123.

3d. That things, not persons, are the objects of property. 2 Bl. Com. 2, 16; 1 Id. 423.

4th. That property in a slave, if it does exist, cannot be transferred without deed; Litt. § 183; and consequently, as it is not in evidence, that the plaintiff was sold to the defendant by deed, the defendant has not proved him to be *his* slave, however the general question may be against the plaintiff.

The Chief Justice delivered the following sentiments, in the course of an elaborate charge to the jury:

McKean, Chief Justice.—The issue is, whether the plaintiff is a freeman or a slave. If the jury think, from the evidence, that the plaintiff's mother was a slave at the time of his birth, according to the laws of Virginia, where he was born, we will point out the legal consequence that flows from the establishment of this fact.

Slavery is of a very ancient origin. By the sacred books of Leviticus and Deuteronomy, it appears to have existed in the first ages of the world; and we know it was established among the Greeks, the Romans, and the Germans. In England, there was formerly a species of slavery, distinct from that which was termed *villenage*. Swinb. p. 84, 6th edit., is the only authority I remember on this point, though I have before had occasion to look into it with attention. But from this distinction has arisen the rule, that the issue follows the condition of the father; and its consequence, that the bastard is always free; because, in contemplation of law, his father is altogether unknown, and that, therefore, his slavery shall not be presumed, must be confined implicitly to the case of villeins. It would, perhaps, be difficult to account for this singular deviation in the law of England, from the law of every other country upon the same subject. But it is enough for the present occasion, to know, that as *villenage* never existed in America, no part of the *doctrine founded upon that condition can be applicable here. The contrary practice has, indeed, been universal, in America; and our practice is so strongly authorized by the civil law, from which this sort of domestic slavery is derived, and is, in itself, so consistent with the precepts of nature, that we must now consider it as the law of the land.

*169]

There is a case in 2 Salk. 666 (*Smith* v. *Browne*), which has not been mentioned at the bar, though it bears considerable relation to the present controversy. It was an action of *indebitatus assumpsit*, for a negro sold; and it was said by Holt, Chief Justice, that a negro, by entering England, becomes free; but that a sale in Virginia, if properly laid, will support the action. Hence, we perceive, how solicitous the courts of that kingdom have been, on the one hand, to discountenance slavery in England; but, on the other hand, to do full justice to the sale, which, by the *lex loci*, was lawful in Virginia, where it was made.

It only remains to observe, that property in a negro may be obtained by a *bonâ fide* purchase, without deed.

Verdict for the defendant.(*a*)

(*a*) See Respublica *v.* Betsey, *post*, p. 469; Commonwealth *v.* Holloway, 2 S & R. 305.

KUNCKEL *et al. v.* BAKER.

Practice.—Special courts.

A special court will not be ordered, on the ground, that one of the plaintiffs has assigned al his interest to the other, and that the latter is about to depart from the country.

THIS was an application for a special court, founded on the act passed the 10th of April 1782. Kunckel, the petitioner, set forth in his affidavit, that one of the plaintiffs, Boom, with whom he had been in partnership, had dissolved their connection, since the commencement of the action, and that the outstanding debts had been assigned to Kunckel, so as to vest in him the whole interest in the event of the action. It was also stated, that Kunckel was about to depart from the United States; but that Boom had no such intention.

The *Attorney-General*, for the defendant, objected, that, by thus assigning the interest in an action to a going foreigner, a special court, and an early judgment, might always be within reach, to the prejudice not only of the defendants but of other creditors. And upon this ground, the Court unanimously refused the prayer of the petition.

The plaintiff's counsel then moved, that he ought not to be deprived of his bail, by this application; which, requiring a declaration to be previously filed, amounted to an acceptance of a common appearance.(*a*)

In the justice of this motion, the Court concurred, and accordingly, directed a rule to be entered, that the defendant give bail in two months, or a *procedendo*.

Rawle, for the plaintiff. *Bradford*, for the defendant.(*b*)

---

*MOORE'S Lessee *v.* FEW *et al.* [*170

Devise.

The act of 1777 disabled non-jurors from *devising* land.

THIS was an *ejectment* for certain premises in the county of Philadelphia.

After solemn argument, by *Wilcocks* and *Rawle*, for the plaintiff; and the *Attorney-General* and *Sergeant*, for the defendant, the CHIEF JUSTICE delivered the opinion of the court, that the word *transfer*, being used among the disabilities to which *non-jurors* are subjected by the act of assembly, passed the 13th of June 1777 (P. L. 37), the testator, John Hunt, under whose devise the plaintiff's title was made, being at the time of his death a non-juror, was incapable of devising lands and tenements.

And, consequently, the defendants, claiming under the heir-at-law, had judgment.

(*a*) The practice is now well settled to be otherwise. It has been repeatedly determined, that filing a declaration is not a waiver of special bail. See Cator *v.* McCarty, 2 Dall. 141; 1 Yeates 103.

(*b*) See McCarty *v.* Nixon, *ante*, p. 78; Ex parte Holker, 2 Dall. 111.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

JUNE TERM, 1786.

DUTILH *v.* RITCHIE.

Title to chattels.

What is such delivery, as will pass the title to goods, as against the vendor's assignee, for the benefit of creditors.

THIS was a *replevin* for divers goods, wares, &c., and property was pleaded in Andrew Clow and others, assignees for the benefit of the defendant's creditors.

The facts were these: The defendant had bought certain goods, for which he gave a promissory note, that was afterwards indorsed to the plaintiff, who went (probably by desire of the payee) to purchase goods from the defendant, on the 8th of April 1785, about five o'clock in the afternoon. He told the defendant, on entering his shop, that he came to take goods in payment of the note, and the defendant (whose attention was taken up, at the same time, by several other customers) handed him such articles as he pointed out, mentioning their respective prices. The plaintiff marked those pieces which he approved of, and laid them on one side of the counter, until he thought he had chosen sufficient to answer the note, and then informing the defendant that he would go for a porter to remove them, he left the shop, without receiving a bill of parcels, or stipulating a time of payment, or tendering the promissory note to the defendant. Immediately after the
*172] plaintiff had left the shop, the defendant shut *it up, and called a meeting of his creditors; for whose benefit, the next morning, and before this replevin was served, he executed an assignment of all his property.

It was held by the COURT, that the property in the goods for which the replevin issued, was not vested in the plaintiff; and the jury found a verdict accordingly for the defendant.(*a*)

Moylan, for the plaintiff. *Millegan* and *Rawle*, for the defendant.

(*a*) See Leedom *v.* Philips, 1 Yeates 529; Harris *v.* Smith, 3 S. & R. 20; Clemson *v.* Davidson, 5 Binn. 398.

SHOTWELL *v.* BOEHM.

Mesne profits.

TRESPASS for mesne profits, after recovery in ejectment.

It was ruled by the COURT, that the plaintiff shall not give evidence of the annual value of the premises, beyond the time of the lease mentioned in the declaration in ejectment,(*a*) although the present action was brought by the lessor of the plaintiff.

Rawle, for the plaintiff. *Sergeant*, for the defendant.

(*a*) S. P. Hare *v.* Fury, 3 Yeates 14. Under the act of 1806, it has been *held*, that the recovery in the ejectment is conclusive, as to all damages subsequent to the service of the writ of ejectment, but as to the previous profits, it is necessary for the plaintiff to show his own title, and possession by the defendant. See McCredy *v.* Guardians, 9 S. & R. 101; Osbourn *v.* Osbourn, 11 Id. 55.

SUPREME COURT OF PENNSYLVANIA.

SEPTEMBER TERM, 1786.

GRIER *et al.* *v.* GRIER.

Award.

An award, that the defendant pay a certain sum *to the executors of A.*, is sufficiently certain; as it may be averred that the plaintiffs are the executors.

AFTER argument by *Bradford* and *Sergeant*, for the plaintiffs, and *Wilcocks* and *Ingersoll*, for the defendant, the CHIEF JUSTICE delivered the judgment of the court in this cause.

McKEAN, Chief Justice.—This is an action of debt upon an arbitration bond; the defendant prayed *oyer* of the obligation and condition; the condition was to submit to the award of five persons, concerning "the exchange of a number of loan-office certificates, and of, upon and concerning an action of slander now depending between the said parties," and also of all other matters, differences and demands, &c. The defendant thereupon pleaded, that the arbitrators made no award. The plaintiffs replied, and set forth an award, whereby (among other things) the arbitrators did award and order, "that in consideration of the loss sustained by the exchange of certificates between John Grier, deceased, and the said Joseph Grier, senior, the said Joseph Grier pay to the executors of the said John Grier, the sum of one hundred and seventy-five pounds;" and then the plaintiffs aver, that they are the executors of the testament and last will of the said John Grier, deceased, in the said award mentioned and intended, and that to them the said sum of 175*l.* by the said writing of award was ordered to be paid by the said Joseph Grier, senior. To which the defendant demurred, and the plaintiffs joined in demurrer.

The exception taken to this award is, that the 175*l.* were ordered to be
*174] paid by the defendant to the executors of John Grier, *deceased, who are *strangers*, and that an award cannot be holden by an averment, but must be expounded by itself and nothing *dehors*. In support of which, the defendant's counsel cited, 1 Bacon's Abr. 139; Hob. 49; Carth. 157; Godbolt 13; Dyer 242; 1 Ld. Raym. 123; 1 Bac. Abr. 141, and Law of Arbitrators 119.

For the *plaintiffs*, it was argued by their counsel: 1st. That it appears sufficiently on the face of the award, that the plaintiffs are the executors of John Grier, by a fair and probable presumption. 2d. That an averment may be of anything not inconsistent with the award. 3d. That the executors of John Grier, deceased, are persons certain and known. And lastly, that if the executors were *strangers*, yet the award is good; for the defendant ought to have rejoined, that the executors were strangers. For which positions were cited, 1 Burr. 277; 1 Bacon Abr. 135, 139, 141, 145, 147; 1 Ld. Raym. 612, 246, 533; Cro. Jac. 200, 354; Cro. Eliz. 858; 8 Co. 98; 3 Vin. Abr. 121; Comyns 329; Carth. 136; 1 Leon. 316; 3 Ibid. 62.

It may not be amiss to observe, that the rules established in England, before the revolution, respecting the construction of awards, have been more liberal and favorable than formerly; that many of the nice distinctions to be met with in our law-books, are by no means to be admitted as precedents in expounding awards, at this day; and that, as arbitrators are judges of the parties' own choosing, for the furtherance of justice, and quieting of controversies, the courts have of late construed their awards with great latitude, and according to their intention, appearing from the words of the whole.(*a*) 1 Burr. 277; 1 Bacon Abr. 139.

However, two of the essentials in awards, are, that they should be certain and final. By the condition of the bond, in this case, it appears, that a particular controversy between the parties was "about the exchange of a number of loan-office certificates," and, by the award, the defendant is ordered to pay to the executors of John Grier, deceased, 175*l.*, in consideration of the loss sustained by the exchange of certificates between the said John Grier and him. From these, it may be collected, that the meaning of the arbitrators seems to be, that a *loss* had been sustained by the exchange of certain loan-office certificates between a certain John Grier, deceased, and the defendants, that this loss affected the plaintiffs in some way or other, because it was made an express article in the submission, and that the payment of the money to the executors of John Grier, should determine the controversy on this account. John Grier, deceased, has executors; who they are may be easily ascertained; as easily as the costs of an action, or the charges of a voyage; which have been adjudged to be good awards, because they can be reduced to a certainty. *Beale* v. *Beale*, Cro. Car. 383; and 1 Roll. Abr. 251. So that this award appears to be certain enough. Besides, if the executors are considered as *strangers*, yet, by the better authorities, an award to pay money to them shall be intended for the benefit of the plaintiffs, and that they, being the submittants, were either the *executors, or authorized by them, unless the contrary appear. 1 Salk. 74; 3 Leon. 62. [*175

With respect to the observation, that an award is to be interpreted by its own words, and not by any matter out of it, it is law; but when the words of an award have relation to things certain, out of the award, these things may be averred.(*b*) 1 Roll. Abr. 264; s. c. Stiles 365. And therefore, as the executors of John Grier, deceased, are persons certain, we think,

---

(*a*) Innes *v.* Miller, *post*, p. 188; Kunckle *v.* Kunckle, *post*, p. 364; Gonsales *v.* Deavens, 2 Yeates 539.

(*b*) Kingston *v.* Kincaid, 1 W. C. C. 448. See Lynn *v.* Rysberg, 2 Dall. 180.

that it may be averred, who they are by name, as has been done by the replication in the present case, were such averment necessary; for it is only explaining more particularly what was contained in the award itself.

Upon the whole, the court is of opinion, that the award in this case is good. Let judgment be entered for the plaintiffs.

Lee *v.* Biddis.

Parol evidence.

Effect of the words "current lawful money."
Parol evidence to show what kind of money was meant, ruled to be inadmissible.

On the trial of this cause, *Lewis*, for the plaintiff, offered evidence to prove what was the money meant to be paid by the contract entered into between the plaintiff and defendant, under the words *current lawful money;* and cited *Morris* v. *Wharton* (*ante*, p. 125).

Sergeant, objected to the evidence, and cited 1 Atk. 447; 2 State Laws 494. Davies 48, 72.

By the Court.—Current lawful money, by the positive words of the act of assembly, means such money as is current at the time of entering into the contract;(*a*) and, perhaps, the evidence offered would not so much contradict the contract itself, as that act of assembly: it would be to substantiate an agreement in direct opposition to the law. The case in Davies, if we could be bound by it at all (which we do not think we can, first, because it is not a judicial determination; and, secondly, because it is before judges in Ireland), would be in favor of the plaintiff, if it had not been for this act of assembly. But, indeed, if this evidence were admitted, it would open a door to such a scene of litigation, that, independent of the act, the argument *ab inconvenienti* never applied in greater force.

The evidence was accordingly overruled, and the plaintiff voluntarily suffered a nonsuit.(*b*)

Kerlin's Lessee *v.* Bull *et al.*

Devise.

A testator devised as follows, "I give and bequeath unto my son A., *when* he arrives at the age of twenty-one years" (a certain tract of land), "to hold to him, his heirs and assigns for ever;" afterwards, he bequeathed to his wife the use and profits of all his lands, for the maintenance and education of his children, until his sons should attain the age of twenty-one, &c.; A. died after the testator, under age, intestate, and without issue, leaving a mother, brothers and sisters: *Held*, that this was a *vested* devise in A., and that the estate was to be divided equally among his brothers and sisters.

This cause now came before the court on a special verdict, returned

---

(*a*) See the note to Morris *v.* Wharton, *ante*, p. 125.

(*b*) The same point was determined in Bond *v.* Haas's Ex'rs, 2 Dall. 188. But in McMinn *v.* Owen, 2 Id. 173, which was an action on an agreement executed in 1779, for the payment of 500*l.* by instalments, the particular kind of money not being specified, it was *held*, that parol evidence was admissible, to show that the instalments were to be paid in whatever money was current at the time they became due.

upon the trial of an ejectment for a messuage and lands in the township of East Whiteland, in the county of Chester. It was ably argued, on the 27th of April, by *Sergeant* and *Bradford*, for the defendants, and *Lewis* and *Wilcocks*, for the plaintiff; *and the COURT having taken time to consider of their judgment, it was this day pronounced by the Chief Justice. [*176

McKEAN, C. J.—This cause was tried at Nisi Prius, in Chester, when the jury found a special verdict, which contains the following statement: That a certain John Hunter, being seised in fee of the premises in question, on the 30th of July 1751, made his last will and testament in writing, duly executed, and, among other things, devised in the words following: "I give and bequeath to my eldest son, James, when he arrives at the age of twenty-one years, all and singular the messuage, &c., to hold to him, his heirs and assigns forever." "Item, I give and bequeath unto my youngest son, John, *when* he arrives to the age of twenty-one years, one hundred acres of land, that I bought of John Chads, known by the name and called Jehu's Hundred, and the house and lot of seven acres of land, lying on the south-west side of the Connestogoe road, near the Whitehorse sign; to hold to him, his heirs and assigns for ever." That the estate devised the youngest son John is the one in question. That afterwards, he devises "to his wife, Anne, the use and profits of all his said lands and tenements, for the maintenance and education of his children, until his said sons should attain to their several ages aforesaid, successively." That the testator died seised thereof, leaving James, his eldest son, and John, Margaret, Hannah, Elizabeth, Anne and Mary, his children, and also Martha, who intermarried with John Rattew, one of the defendants. That the other defendant intermarried with the daughter Anne. That John, the devisee, died in the year 1769, under age, intestate, unmarried, and without issue, living his mother, his brother James, and all his sisters. That the lessor of the plaintiff has the estate that was in James, who was found to be the heir-at-law of John. But whether, upon the whole matter, the defendants be guilty of the trespass and ejectment, the jurors know not, &c.—in common form.

The questions that arise upon this special verdict, are two: 1st. Whether the estate vested immediately in John, or remained in contingency, until he came of age? And, if it be a vested devise, 2d. Whether the lands in dispute went to James, his eldest brother, as his heir at common law, or were subject to distribution, under the act of assembly, amongst his brothers and sisters, as he died intestate, under age, unmarried, and without issue?

To prove that it was a contingent and lapsed devise to John, the counsel for the defendants cited 3 Bacon's Abr. 478; 1 Burr. 227; and 2 Salk. 415; and insisted, that where the time is annexed to the *substance* of the gift, and not to the *possession*, there it is a lapsed devise, by the devisee's not living until the time specified.

And to show, that if the estate vested immediately in John, by the devise, upon the death of his father, yet it descended and was to be distributed equally among his surviving brother and sisters, they produced the "supplement to an act of assembly, intitled "An act for the better settling intestates' estates," passed the 23d of March 1764, in page 307 of the first volume of

Pennsylvania Laws :(*a*) and *also cited a case determined at Nisi Prius, in Bucks county, by Judges Lawrence and Willing, in 1773, in an ejectment by Joseph Heister's Lessee *v.* Jacob Lambert ; wherein this point was ably argued and adjudged for the party claiming distribution.(*b*)

For the plaintiff, it was insisted, that this was a vested devise, and in support thereof, they cited 3 Bacon's Abr. 478 ; 2 Vent. 366 ; 3 Co. 21 ; 8 Vin. 370, pl. 13 ; 373, pl. 12, 16 ; Gilb. Rep. in Eq. 36 ; 2 Mod. 289 ; 2 Freeman 243 ; 2 Vern. 561, and 1 Burr. 228. And that the cases mentioned on the other side were of lapsed *legacies*, and not *devises*.

And on the 2d question, they urged, that the original act of assembly, as well as the supplement, must be taken into consideration, and then it will appear, that the supplement only related to such lands as should come to a child from an *intestate* father or mother, by descent, and not to those he should acquire by *purchase*, as in the present case, by the will of the father. And that this case does not come within even the words of the act, which are, " if after the death of any father and mother, any of their children shall die in their minority and intestate, but not otherwise, &c.;" for the mother survived the son John, the devisee. It was further said, in answer to the case cited to have been determined at Nisi Prius, in Bucks, that the two judges did not pretend to be skilled in the law, and that they were obliged to give their judgment on a sudden, and without deliberation; and that, therefore, it ought to have little or no weight.

The Court have detained this action under advisement until now, and with respect to the first question, whether the devise to John is a vested, or contingent and lapsed devise ? they are clear, that to effectuate the intention of the devisor, it must be construed a *vested* devise.

The absolute property is given to John, when he should arrive at age, and the use and profits in the meantime to his mother, for the maintenance and education of all the children. This last devise is a *particular* interest, and no more than a chattel interest. The son John was the principal object of the testator's bounty, and if he had married, and died before twenty-one years of age, leaving *children*, he certainly meant not that this estate should go from them. This, therefore, was an immediate gift to John, though he was not to have the *possession* until he came of age. All the cases support this judgment. Legacies are governed by the rules of the civil and ecclesiastical courts ; devises by the intention of the testator.

The 2d question is, whether by the intestate laws of this state, the lands in dispute belonged to the eldest brother, James Hunter, or to all the sisters equally, upon the death of John, intestate, under age, unmarried, and without issue ?

I will make an observation or two, previously to my delivering the particular opinion of the court on this point.

*178] *1. Where the intention of the legislature or the law is doubtful, and not clear, the judges ought to interpret the law to be, what is most consonant to equity, and least inconvenient. Vaugh. 38, 285.

(*a*) See this act at length, in a note to p. 159 of the 3d vol. of Smith's Laws.

(*b*) See *ante*, p. 20.

2. A court is not bound to give the like judgment, which had been given by a former court, unless they are of opinion that the first judgment was according to law(*a*); for any court may err; and if a judge conceives, that a judgment given by a former court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to law. Acting otherwise would have this consequence; because one man has been wronged by a judicial determination, therefore every man, having a like cause, ought to be wronged also. Vaugh. 383.

We will now have recourse to the supplementary act of assembly (1 State Laws 397), and consider the words and the spirit of it. In the case before the court, John Hunter, the devisee, died intestate, under age, unmarried and without issue, after the death of his father, his mother surviving him. The words of the act are, after the death of any father *and* mother, so that he was not within the words; but I am of opinion, that the word *and*, in this place, must be construed *or*; as, in the very next sentence, the mother is given an equal share of the personal estate of such intestate child, which came from the father, with the brothers and sisters of such child; which shows, the legislature did not mean that the estate should not be distributed, unless both parents were dead. The clause respecting the real estate of an infant intestate, does not take notice or distinguish, whether it was to come from the father or mother, by *descent* or *purchase*, or *how* it was to be acquired, or from *whom*; but says generally that all his lands, &c., shall be divided, &c. And it is remarkable, that the personal estate of such an intestate is to go in the same manner with the real estate: but in the following sentence there is an express provision for the mother out of that part of the personal estate, to which the intestate shall be entitled under such father; which shows, manifestly, that the mother was not to have any share of any personal estate that should be acquired by such child, in any other manner than from the father; and perhaps, they meant in both cases an *intestate* father; but this is by no means clear; it is very doubtful, from the disposition of the personal estate, that was acquired differently; and our constitution and laws favor equality and distribution of estates.

This act of assembly has been made upwards of twenty years ago, and the question upon it now before the court has received at least one judicial determination, thirteen years ago, that the real estate, in such a case, should be distributed among the intestate's brothers and sisters equally. When there has been a solemn determination before two judges of the supreme court, after debate, and an acquiescence under it, there ought always to be great consideration paid to it, that the law may be certain. Upon the best information we can obtain from the gentlemen of the law in different parts of the *state, we find that estates have been distributed agreeable to this determination. And as this construction of the act has been so long accepted and received as a rule of property, though some may not be satisfied in their private judgment, were the matter to be newly resolved, it is but reasonable, we should acquiesce and determine the same way, in so [*179

(*a*) The same sentiment was expressed by Judge DUNCAN, in Bevan *v.* Taylor, 7 S. & R. 401, referring to the opinion in the text.

doubtful a case, to prevent greater mischiefs which may arise by shaking a number of estates, and from the uncertainty of the law.

Let judgment be entered for the defendants.(*a*)

(*a*) The decision in this case was under the act of 1764, and the case of Larsh *v.* Larsh, Addis. 310, was determined upon this authority. In Shippen *v.* Izard, 1 S. & R. 222, it was *held*, under the act of 1794, that if an estate be *devised* to one, by his father, or paternal grandfather, and he die, leaving neither widow, nor issue, nor father, but leaving a mother, she is not entitled to enjoy the estate during her life.

HIGH COURT OF ERRORS AND APPEALS,

OF PENNSYLVANIA.

SEPTEMBER SESSIONS, 1786.

PURVIANCE *et al. v.* ANGUS.

Master of vessel.

The master of a vessel is liable to his owners in damages, where they have been compelled to pay damages to a third person, for injury sustained by him from the misconduct of the master whether the injury arose from error in judgment, or wilful trespass, on the part of the master.
In the action against such master, the court of admiralty is not bound to decree the whole sum paid by the owners, but may reduce the damages, at discretion.
Dean *v.* Angus, Hopk. Adm. 91, reversed.

THIS was an appeal from the Court of Admiralty.(*a*) It was argued, on the 7th and 8th of July, by *Lewis*, *Wilcocks* and *Sergeant*, for the appellants; and by *Bradford*, *Ingersoll* and *Wilson*, for the respondent. The court held the matter for some time under advisement, in hopes that a compromise would have taken place between the parties; but on the 27th of September, the Chief Justice delivered the following judgment.

MCKEAN, Chief Justice.—I will state the case as it appears before the court, from the proceedings and the evidence, which are not controverted on either side; and shall then take notice of those points which have been disputed.

The appellants, on the 28th day of August, 1779, were owners of a brigantine, called the Hibernia, then riding at anchor in the port of Philadelphia, and appointed the respondent master and commander, on a voyage from thence to Orotava, in the island of Teneriffe, having a commission as a letter of marque and reprisal. The owners, in the sailing orders then delivered to the respondent, (among other things) "advised him to keep company with the armed vessels bound to the eastward, as far *as he should think it prudent;* and that should they agree to cruise two or three weeks on the coast, he had their approbation in joining with them." The respondent sailed on his intended voyage, and in the river Delaware joined *the brigantine Achilles, whereof George Thompson was master, and the [*181

(*a*) The decree of the court of admiralty, together with the evidence, will be found in Judge Hopkinson's Admiralty Cases, p. 139, 152.

Patty, whereof John Prole was master, each having a commission of letter of marque; and about the 1st of September following, they proceeded to sea in company, standing to the eastward.

On the 6th of September, in the forenoon, a firing of cannon was heard by the people on board the Achilles and Patty, and in the afternoon, the Achilles and Patty had altered their course, and being swifter sailors than the Hibernia, left her at some distance; they then waited for her, and when she came up, she inquired the reason of their altering their course, and was informed, that they had seen two sail and given them chase. At this time, the two vessels were not in sight, the Achilles and Patty having waited for the Hibernia, until they were lost: They all three then continued the same course, until the morning, when, at daylight, two vessels were descried, lying close together, by each of the masters of the three brigantines, who forthwith made towards them; and the Achilles and Patty, after firing a few guns, took possession of a brigantine, called the Betsey, which had been a British vessel, bound from Montserrat for New York (which places were then possessed by the enemy), and was captured, the day before, by the Argo sloop of war, belonging to the United States, Silas Talbot, Esquire, Commander. At this juncture, the Hibernia was a few miles astern of the other brigantines, and when she came up, the respondent asked, "what vessel they had brought too?" and was answered, "a brig from Montserrat, bound for New York; a good prize." In consequence of some conversation with the captains of the two other vessels, the respondent sailed in pursuit of the Argo, then in sight, and did not rejoin them, until near sunset, when a boat came along side from the Patty, and asked for men to assist in navigating the Betsey into some port. The respondent immediately put two men into the boat, and signed orders for William McNeal, who had been appointed prize-master, which contained these words, "to get her, if possible, into Delaware, Egg Harbor, or Chesapeake, for fear of the Sloop Argo falling in with you, if you go to New England;" and "beg of McNeal to stand to the southward, this night and strive hard for Philadelphia." These orders are dated "the 7th September 1779, at sea, on board the brigantine Patty," and were signed, first by John Prole and George Thompson. So far the facts are agreed.

Mr. William Davis, who was a passenger on board the Patty, swears, "that he verily believes, the firing of cannon on the 6th, about ten o'clock in the forenoon, was heard on board the Hibernia, and that the people on board each of the three brigs saw two vessels engaged in fight, for that he heard and saw them distinctly; that the three lay becalmed within hail of each other, that the Argo and Betsey were then about three leagues distant from the three brigs, and that the firing continued more than an hour." He further is positive, that the respondent, and Prole and Thompson, had a consultation, in his presence, about the brig Betsey, whether she was prize *182] *or not; and that they concluded to secure her as a prize, as they disbelieved what had been said by West and Church, about her being prize to the Argo, or if she was, yet, as they had been in sight at the time of the capture, they were entitled to a share. These facts are also confirmed by the deposition of John Groves.

On behalf of the respondent, the depositions of John Brice, first mate of the Hibernia, John Magill, George Stout, George Eldridge and Aaron Ash-

bridge, mariners on board, and of Doctor Wilson Waters, surgeon of the Hibernia, prove, that *they* did not see the Argo and Betsey, nor hear any firing of cannon, on the 6th of September, and that neither Captains Prole nor Thompson were on board the Hibernia on the 7th, nor was the respondent on board either of their vessels. In which last particular, Davis and Groves concur. These witnesses also differ with Davis and Groves, about the hour that the Hibernia sailed in pursuit of the Argo, the duration of the chase, and the time of her return and rejoining the other brigs.

It has also been given in evidence, that a suit had been instituted in the admiralty by Captain Silas Talbot, *qui tam*, &c., against the owners of the three brigantines, for the spoliation of the Betsey and her cargo, who, upon an appeal to this court, were decreed to pay 11,141*l.* 5*s.* 4*d.* damages to the libellant, besides the costs, of which sum the present appellants, as owners of the Hibernia, paid 3795*l.* 3*s.* 6*d.*, and towards costs —— on the 22d January 1785.(*a*)

Upon this state of the case, two questions arise: The 1st of *fact;* the 2d of *law.*

1st. With respect to the fact, there are two points: 1st. Whether the respondent did willingly join the two other captains, Prole and Thompson, in the tortious capture of the Betsey from the Argo, knowing her to have been a prize to the Argo, and that the Argo was a friend? This would undoubtedly have been a *lata culpa*, an evident trespass, to call it by no harsher name.

If he did not, then, 2d. Whether he was guilty of such gross negligence (*crassa negligentia*) as by law will make him responsible to the appellants, considering the relation between them as owners and master of a vessel?

As to the 1st point, the evidence is not so satisfactory as might be wished in a case of such consequence to the parties. Had there been evidence given respecting the credit of the several witnesses, the matter would have been clearer. If Davis and Groves are to be credited, in addition to the other evidence, there is a very strong presumption indeed, that the respondent is guilty of a great wrong, of a clear trespass; for if he saw the fight on the 6th, as he next day found that the Betsey, which had been captured, was an enemy, he must have concluded, that the Argo was a friend. And if all that the other witnesses swear in behalf of the respondent, is true, yet I do not think, that the evidence of Davis and Groves is thereby invalidated. With respect to hours or times, in which particular occurrences or transactions happened, witnesses of thr greatest integrity *may and often do differ: this has happened, in the cause before us. But as to [*183 other matters, the witnesses on board the Hibernia only swear, "that they did not see nor hear, what the others say, they did." The rule in such a case is, "that one affirmative witness countervails the proof of many negative, because both may swear true," and such interpretation should be put on the whole testimony, as to reconcile it; for, one may see and hear what another does not. Gilb. Law of Evidence 157. However, it does not appear necessary to determine this first point, as the second question admits of little difficulty, viz., whether the respondent has been guilty of such gross negligence as should make him responsible?

(*a*) See *ante*, p. 95.

The respondent was near to the Betsey, as well as the two other letters of marque; he might have gone on board her, and made every necessary and proper inquiry; he sent two of his crew on board her, to get her, if possible, into Delaware, &c.; he signed the order to McNeil, the prize-master, which must have shown, to perfect conviction, that the Betsey had been captured by the Argo, and that she was a friend. But it is said, that he confided in Prole, whom they had made commodore, and in Thompson; that they deceived him; and that he signed the orders to the prize-master, without reading them; and, in short, that he implicitly obeyed, and did whatever he was told to do. The respondent should have reflected, that the seizing a valuable vessel and cargo, was a serious piece of business, if belonging to a friend; he should, therefore, have weighed the consequences of his credulity in others; he could have inquired for himself, and had the same evidence with Prole and Thompson; he should have considered, that his owners placed their confidence in him, and in no other; he should have acted for himself, and taken care that he did no injury to any one. But he does not appear, by the defence made for him, to have exercised his own judgment at all. Was this using proper care and diligence, or was it inexcusable conduct, and gross negligence?

2. Let us now consider the law upon this evidence; for, *ex facto oritur lex.* It is agreed, that every one of the parties to a trespass, who participates in it, is a trespasser, and an action will lie against him as a principal; for there can be no accessary to a trespass, Bro. trespass, pl. 113; 1 Lev. 124: that a trespass was committed in taking and carrying away the Betsey from the commander of the Argo; that the respondent was present, aiding and assisting in the taking and carrying her away: and that Captain Silas Talbot could have maintained his suit against the respondent, as well as against his owners, for the wrong and injury they have done to him. But it is contended, that though he might be responsible to Captain Talbot, he is not so to his owners, for that his relation with them was by contract, and the contract between a servant and his master, or between the master of a ship and his owners, points out the measure of the servant's or master's responsibility; that he ought not to be accountable in damages for an error in judgment, but only for the fault of the heart, and that he acted according to the *best of his judgment; and his error in this business arose from the misinformation and deception of Prole and Thompson. In support of this doctrine were cited 1 Black. Com. 422, 309; 3 Id. 163; 3 Bac. Abr. 544, 564; 4 Co. 83, 84; 10 Mod. 109; 4 Burr. 2060; 11 Mod. 135.

*184]

In reply to this, it has been argued, that the master or commander of a privateer or letter of marque, may lawfully stop the ship of a friend, examine her papers, the people on board, the cargo, &c., in order to discover, whether she belongs to a friend or an enemy; and if upon the whole it should be doubtful, to bring her into port, for further inspection and trial, without breaking bulk, or embezzlement of the lading. But if the captor embezzled the cargo, disposed of or used any part of it, sent away the captured mariners, or did any other acts, which show he could have no reasonable doubt, in such case, he is liable for damages and costs. Lee on Captures, 202, 240; Beawes L. M. 207; 1 Roll. Abr. 530.

It is insisted upon, that a master of a ship is one, who, for his knowledge in navigation, fidelity and discretion, hath the government of the ship

committed to his care and management; that he must give an account for the whole charge, and, upon failure, render satisfaction: and therefore, if misfortunes happen, if they are either through the negligence, wilfulness or ignorance of himself or mariners, he must be responsible; and his owners may sue him for reparation of damages, jointly or separately, both according to the common law and marine law. See 1 Vol. Laws of Admiralty 186; Beawes L. M. 49; Buller's Nisi Prius 24; 3 Keble 444; 3 Bac. Abr. 564; 3 Black. Com. 163.

A great loss, then, has been sustained by the injury done in the seizure of the Betsey; it will be heavy, and must finally fall upon the owners or master. If the bringing the Betsey too, for the purpose of inquiring whether she belonged to a friend or an enemy, was lawful, the subsequent conduct was unlawful, and the seizors came thereby trespassers *ab initio*.

This was a *lata culpa* in Prole and Thompson, at least, the respondent was present aiding and assisting in carrying her away from the Argo. If one does a trespass, and others do nothing but come in aid, yet all are principal trespassers. Bro. Trespass, pl. 232, 20; Vin. Abr. 460, title Trespass, pl. 3, and fo. 466, letter U. If A. comes in aid of B., who beats me, yet he is a trespasser as well as B. 22 Ass. 43. If the conduct of the respondent was not wilful and with full knowledge, yet it appears to us have been a *crassa negligentia*, and that any reasonable man, upon inquiry, and the least reflection, upon reading the orders given to the prize-master McNeil (and he ought to have read them), or upon the circumstances attending the whole transaction, must have been satisfied, that the Betsey was a prize to the Argo. It is a wrong position, that a master of a ship is not answerable for an error in judgment, but only for the fault of the heart, in civil matters. In criminal cases, as well in others, as in a master of a ship, it is true. One *non compos mentis* is answerable civilly for *a wrong done to another. Reasonable care, attention, prudence [*185
and fidelity, are expected from the master of a ship, and if any misfortune or mischief ensues from the want of them, either in himself or his mariners, *he* is responsible in a civil action. And it must appear very strange to any understanding, that the owners of a vessel should be answerable in damages for the misconduct of the master, merely because they appointed him master, and that the master, the actual malfeasor, should not be accountable over to them; that the innocent should suffer, and the guilty person go scot-free. We know of no such law.

Upon the whole, the Court are of opinion, that the sentence of the court of admiralty be reversed; and this court do decree and adjudge, that the respondent do pay to the appellants the sum of 3795*l.* 3*s.* 6*d.*, and the interest thereof from the 22d day of January 1785, together with the costs by them paid in the former cause by Silas Talbot, *qui tam*, against them and others, and also the costs of this suit in the inferior court, and that each party shall pay their own costs in this court, the same to be taxed by the register, or this court.

Atlee and Rush, Justices, dissented from this opinion of the court, for reasons which they assigned separately and at large.(*a*)

(*a*) The opinion of Judge Rush, which in the former editions was subjoined in the appendix, is now introduced in the proper place.

RUSH, Justice.—As my opinion differs from that of the court, just delivered by the Chief Justice, I will give the reasons of my dissent somewhat at large.

A libel has been filed in the court of admiralty for the state of Pennsylvania, on behalf of John Purvyance, Joseph Dean and Benjamin Harbeson, against John Angus, setting forth and charging, that the said John Angus was duly appointed master and commander of the brig Hibernia, the property of the libellants, bound on a voyage from Philadelphia to the port of Orotava, in the island of Teneriffe; that on his voyage aforesaid, the said Angus, without any probable cause of capture, and with a view to his own private interest and emolument, did combine with certain malefactors, and take the brig Betsey out of the possession of Silas Talbot, the said brig being at that time a prize to the said Talbot, and that Angus knew she was prize to him. The libel further charges, that Talbot hath recovered 4000*l.* against the libellants for the trespass and injury aforesaid; and concludes with praying, that as the libellants have been compelled to pay that sum of money through the misconduct of Angus, their captain, they may be enabled to recover from him a full equivalent.

To this libel, an answer hath been filed on the part of Angus, in which he explicitly denies his taking the Betsey on the high seas, without authority from his owners, and without probable cause. He also utterly denies, that he knew the brig Betsey had been taken by Talbot, and that he had any intention to defraud him, or his, Angus's, owners.

A variety of depositions and exhibits have been produced in the cause, and the judge of the admiralty hath pronounced a decree in favor of Angus, the respondent. From this sentence, an appeal hath been brought by the libellants to this court, the highest in the state, having the ultimate and superintending power to correct the errors of all inferior tribunals.

It is right and proper, before we examine the evidence, accurately to state the question in controversy.

We are not now to decide, generally, whether masters of vessels are not responsible to their owners for neglect of duty, or breach of trust; it being admitted on all hands, that the master may sue his servant for any breach of trust or confidence. If a shepherd, by his negligence, suffer my sheep to be drowned; or should my cattle, through the negligence of my servant, commit a trespass upon my neighbor; the shepherd and servant are both liable in these cases. And in the latter case, I am responsible over to my neighbor for the injury he receives through the neglect of my servant. Doctor & Student 37; Noy 109; 5 Co. 13, 14.

Nor are we now to inquire, whether Angus be responsible to Silas Talbot for trespass. I admit, that he is clearly so; and that no defence he could make, founded on ignorance, accident or mistake, could avail him on such suit by Talbot. If Angus joined in the trespass, it is immaterial to Talbot, what were his views, or whether he did it intentionally, or not. If I hurt a person, through negligence, it is no justification, in an action of assault and battery. Buller 16. And there is a case in one of the books, where a gun went off by accident, and wounded a person, and it was held that trespass lies. It is to no purpose, therefore, and wide of the present question, to cite authorities to prove that in trespass all are answerable. Whether Angus showed more or less zeal; whether he did all he could, or not, are useless

inquiries at this time. In trespass, all are liable; and this rule would apply in a suit by Talbot against Angus, even though the trespass might appear, on the part of Angus, to have been incautiously, or unintentionally, committed.

The question before the court is a special one, resting on its own peculiar circumstances, and not involving in it the examination or adjustment of any general principles of law. But before I proceed to state what I take to be the question, I will make a few previous observations, on the doctrine of responsibility, so far as the same is applicable, or necessary, at present.

The owners, as well as the masters of vessels, are, by the civil law, liable for trespasses committed on the sea. The owners are liable, on the principle, that the master is their servant, bound to obey their orders, and to pursue their instructions: a confidence or trust is reposed in him, that he will conduct himself agreeable to the principles of integrity and good faith; and that he will be guilty of no outrage upon others, nor of any criminal neglect whatever. By rendering the owners responsible for the masters, the law hath laid them under the strongest obligations to employ none but men of skill, capacity and integrity, to navigate their vessels. Perhaps, too, the principle in part received its establishment, from an apprehension, that the commander of the vessel might not be of sufficient ability to compensate for the injury committed by him. In all cases of spoliation, both master and owners are equally liable to the party wronged.

But what is the nature of the contract between the owners and the master? It is either general or special. It is either created by the law, or by the parties themselves. A commander of a vessel, on going to sea without *any* instructions, is bound to govern himself by law; and, in such case, if his owners are injured through his misconduct, he is certainly responsible again to them. This duty, however, which the law imposes upon the commander of a vessel, may be altered by his owners. They may, for example, order him to take and seize the vessel of a friend; and in case of his compliance, both he and his owners will be responsible to that friend; but the master, in this instance, will not be liable to his employers, because he acted according to instructions. The rules of responsibility, therefore, are not reciprocal. The owners may be liable to a person injured, and it will not thence follow, that the master is answerable again to his owners. These observations are made to refute a very improper inference, that because a master has injured a third person, for which the owners are liable, that, therefore, the master is again responsible to the owners.

The question, then, before the court is this: Is Angus (who actually committed a trespass on the property of Silas Talbot, in conjunction with captains Prole and Thompson, and whose owners, the present libellants, have since been compelled to make compensation to Talbot for the trespass of Angus) responsible to his owners, for the moneys paid by them on account of the said trespass, under all the circumstances of the case?

This I take to be a fair state of the question; and the answer must depend, *first*, upon the evidence, and *secondly*, upon the law.

I have stated in the question, that Angus committed a trespass. This appears evident from his signing the orders, and from his putting two sailors on board the Betsey, to assist in navigating her into port: unless, therefore, it can be shown, that Angus was imposed upon by his comrades, Prole and

Thompson, to act in this manner; and that he was authorized to place a reasonable confidence in them, the decree of this court ought to be against him. In other words, unless he can show some authority, either express or implied, for what he did, he ought to be considered in the same criminal point of view with the two other captains.

In the beginning of September 1779, the Hibernia, commanded by Angus, left the Capes of Delaware, in company with Captain Thompson, who commanded the Achilles, and with Captain Prole, who commanded the Patty. They were all armed, and had letters of marque. Upon the 6th and 7th of the same month, the transaction happened which gave rise to the present dispute. William Davis, a passenger on board the Patty, says, that on the 7th, about ten o'clock, A. M. he heard a firing, and saw two vessels engaged in battle, and that, at that time, the three brigs, the Patty, Achilles and Hibernia, were within hail of each other. This firing, if ever heard on board the Patty, or the battle seen, must have been on the sixth, and not on the seventh. He adds, that he verily believes that the two other brigs heard the firing also.

In opposition to this evidence, let us contrast the testimony of James Leach, the master, and John Russel, the mate, on board the Betsey. They both swore, that, at the time the Betsey was captured, there was no other vessel in sight but the Argo; and they add, that they verily believe no person did see any other vessel. If they were in sight of Davis, Davis must also have been in sight of them; and the firm belief of Leach and Russel, that no vessel was in sight, is at least equal in point of proof, to the firm belief of Davis, that the Hibernia and Achilles saw the engagement. It is remarkable too, that Davis says, that Angus had his boat hoisted out, in which he is contradicted by all the other witnesses, and appears to be under a great mistake.

But I shall waive any further observations on this point; for, though it should be admitted that Davis, and those on board the Patty, heard the firing and saw the chase, it cannot thence be inferred, that those on board the Hibernia did; especially, as they swore that they did not. Inattention, noise, and a variety of other causes, might prevent the people on board one vessel, from seeing or hearing what those on board another vessel did see and hear.

It appears to me, therefore, highly probable, from the evidence before the court, that Angus did not, on the 6th, see the taking of the Betsey. His conduct on the 7th, when he came up to the other captains, strongly confirms this idea. For no less than six witnesses out of the seven, who were present when Angus came up (that is, every witness except Davis), expressly mentions, that Angus inquired what they had got; and upon being told she was a good prize, he replied, if she is a good prize, so must the sloop be; and that he further asked, why one of their fast-sailing vessels did not chase her; upon which, they ordered him to pursue her, which he immediately did.

Now, it is in full proof, from the evidence of Captain Talbot, that the two other brigs had been up with the Betsey, about an hour before Angus came up, and that their boats had frequently passed to and from the Betsey. They, therefore, had full information; but Angus had not the least knowledge, except what he received from their declaration, that she was a good

prize. If then she had been a good prize, of which he had not at that time the least reason to doubt, well might he reply, that the other vessel, meaning the Argo, was also a good prize. This observation, made at this period of the business, unanswerably shows, that he could not have seen the Betsey and Argo engaged; for, it is not conceivable, that he could be so grossly ignorant and stupid, as to see two vessels engaged in battle, and at the same time, suppose them to be both enemies.

With respect to the idea of the three captains having consulted what to do with the prize, it scarcely merits consideration. Groves says, that he does not know on board which vessel the consultation took place; in which he is contradicted by Davis, who says it was not on board any particular vessel, but that each captain continued on board his own. The truth, however, is, that there never was any consultation, and in this all the other witnesses agree.

The orders from the three captains to the prize-master, and which are signed by Angus, contain a direction to him to get, if possible, into Delaware, Egg Harbor, or Chesapeake, "for fear of the sloop Argo's falling in with you, if you go to New England." From these expressions, it has been contended, that Angus was privy to the whole transaction; but I do not see the thing in that point of view. It is possible, that he signed the orders without considering attentively the meaning of the words, believing, at the same time, that his comrades, who had made the necessary inquiries on board the Betsey, had their reasons for inserting them. It is certain, that he thought the Argo an enemy, and as such pursued her. He might, therefore, very naturally have supposed the other captains had reason to believe the Argo was bound to New England; and that, on this account, they had inserted those words in the orders.

What, then, is the nature and history of the present transaction? Three vessels, commissioned as letters of marque and reprisal, being about to sail at the same time from the port of Philadelphia, the owners of the Hibernia, give *their* master orders to cruise with the other two. He does so; and in the course of their united operations, he is deceived and misled by them in such manner, as to concur with them in committing a trespass. Had Angus been directed, generally, to cruise, the case might have been different; for then every degree of confidence reposed in his associates, must have been at his own risk. But Angus, being expressly authorized to cruise with the two other vessels then sailing to the east, any act or event which was likely to happen on a joint cruise by the three vessels, or which might have been rationally expected in the usual course of things, was as much authorized, as the cruising itself was. Everything usually done by persons jointly cruising, is implied in the authority to Angus to cruise with the others. The owners themselves have laid the foundation of the trust or confidence that he reposed in Prole and Thompson, and should, therefore, alone suffer. The conduct of Angus seems to be clearly warranted by the rules and maxims that invariably govern the commanders of vessels, when they act in conjunction with others on a cruising voyage. I perceive neither *crassa negligentia*, nor *lata culpa* in his behavior; and I take the law to be, as stated in 4 Burr. 2060, that he is not answerable, unless in those two cases. It is preposterous to say, that he ought not to have credited Prole and Thompson, when he was ordered

to join with them on a cruise. Hard is the doctrine, that a servant, who apparently acts in the best manner for the interests of his master, should be liable for unavoidable failures, especially, when they originate, not in himself, but in others: it is sufficient to deter all men from accepting a trust.

This authority to cruise with Prole and Thompson, certainly means something; but, if it will not justify Angus's conduct on this occasion, it is totally insignificant and void; and an authority to cruise with others, is an authority to do nothing; that is, no authority at all.

However disposed to concur with my brethren in this cause, I have not been able to do it. Unanimity in courts of justice, though a very desirable object, ought never to be attained at the expense of sacrificing the judgment.

Upon the whole, as it appears to me, that Angus did not combine with the other captains to take the Betsey out of the possession of the Argo; and that he acted such a part, as he thought would promote the interests of his owners; my opinion is, that the decree of the lower court should be affirmed: but a majority of this court entertaining different sentiments, it must, nevertheless, be reversed.

The counsel for the respondent afterwards moved the court for a rehearing, upon a suggestion of new evidence, &c., and upon that occasion, Judge SHIPPEN made the following observations:—

SHIPPEN, Justice.—When this court delivered their decree that the respondents should pay to the appellants the sum of 3795*l.* 3*s.* 6*d.*, they estimated the damages by what they conceived to be the value of the vessel and cargo, having then, I believe, no doubt but that the loss sustained was the proper measure of damages. The conduct of the respondent, though certainly unjustifiable, appeared from the evidence to be attended with such favorable circumstances, that if the idea had been entertained, that the damages were discretionary, and could have been legally diminished, I, as one of the court, should certainly have given my voice for a much less sum. Whether the court had, or had not, such a discretionary power, was not made a question on the hearing, but has since occurred to me; and having met with a case which goes a great way towards establishing the principle, I should be willing to have the case reheard as to this point. The case I allude to, is that of *Russel* v. *Palmer*, in 2 Wils. 325, which was a special action on the case against an attorney, for negligence, in not charging the defendant in execution within two terms after the judgment, whereby the plaintiff lost his debt, the defendant having obtained a *supersedeas*, agreeable to a rule of the court of king's bench, and had been discharged out of custody. On the trial of the cause before Lord Camden, a verdict was given for the plaintiff
*186] for 3000*l.*, the *whole debt, by the chief justice's direction. But, afterwards, on a motion for a new trial, the chief justice himself, and the rest of the court, were of opinion, that he had misdirected the jury in telling them, that they ought to find a verdict for the whole debt, whereas, the action sounding merely in damages, the jury ought to have been left at liberty to find what damages they thought fit. Accordingly, a new trial was ordered, and on the second trial the jury were told, that they might find

what damages they pleased, and on some favorable circumstances appearing for the defendant, they found only 500*l.* in damages.

The similarity of this case with that before the court, inclines me strongly to admit a rehearing of the cause as to this point, whether, if the court should be of opinion, that the respondent is answerable on the point of gross negligence, they are bound to estimate the damages by the real loss, or whether they may not mitigate them, according to the circumstances and degree of negligence in the respondent.

The Court, on consideration, directed a rehearing as to this point only; and, after argument, reducing the damages, they gave the following judgment:

The Court do award, that the respondent do pay to the appellants the sum of 948*l.* 15*s.* 10½*d.*, and the interest thereof from the 22d day of January 1785, together with the fourth part of the costs by them paid in the former cause by Silas Talbot *qui tam* against them and others; and also the costs of this suit in the inferior court; and that each party pay their own costs in this court. the whole of the aforesaid interest and costs to be taxed by the register, or this court.(*a*)

(*a*) See the note to Talbot v. The Three Brigs, *ante*, p. 109.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

SEPTEMBER TERM, 1786.

CHAPLIN *v.* KIRWAN.

Arbitrators.

Referees have no right to examine a witness *ex parte*.

THE referees in this case had allowed *ex parte* evidence to be given, of the current price of coachmakers' work, at the time when the cause of action accrued. For this reason, the defendant moved to set aside their report. And—

BY THE COURT.—If referees make inquiries abroad, to ascertain for their own satisfaction, the price of work, or the truth of any other matter, which may be said, comparatively, to be of a public nature, this, so far from being irregular, would be highly commendable. But it is a very different case, when they proceed separately to examine a witness, who has been produced by one of the parties, although the evidence relates only to those general points. The adverse parties should have an opportunity of cross-examining the witness.(*a*)

The report set aside.

HOOTON *v.* WILL.

Relation of judgment.

IT was ruled in this cause, that a judgment shall not relate to the first day of a term, so as to cut out a domestic attachment.(*b*)

(*a*) See Hollingsworth *v.* Leiper, *ante*, p. 161, and the notes.

(*b*) It appears from the MSS. of President SHIPPEN, that the questions raised in this case, were argued by *Lewis*, for the plaintiff, and *Ingersoll*, for the attaching-creditors, and the following note is given of the opinion of the court: "The court did not give any judgment in this case, but expressed their opinion clearly on the *first* point, that a judgment, subsequent to the attachment, should not relate to the first day of the term, so as to avoid the lien of the attachment. The *second* point, whether the great delay in the proceedings on the attachment, the discontinuing it on the docket, by entering a

*Innes v. Miller.

Award.

It is not sufficient cause for setting aside a report, that the referees, after settling the principles of the report, asked the plaintiff if he would agree that a quarter's rent which had accrued after the action brought, should be taken into the settlement.

Referees having settled their minds with regard to their report, sent for the plaintiff, and asked him whether he would agree that a quarter's rent, which accrued after the action brought, should be taken into the settlement, and the defendant credited for it, which would have made the balance in favor of the latter. This the plaintiff refused to comply with, and withdrew, without being asked another question, or saying anything further upon the subject. A motion was now made to set aside the report.

By the Court.—Referees ought to proceed, not only so as to do justice, but to avoid the appearance of injustice; lest a precedent should be established, which might afterwards be perverted to a bad use. Misbehavor is, therefore, a reason for the court to interpose and set aside a report, no less than partiality and corruption. Referees, however, are allowed greater latitude in their proceedings than juries. They are not equally bound to time and place, nor to the same strictness of method in receiving testimony.

A reference would be of little service, if a report were liable to be set aside, for an irregularity so small as that mentioned by the counsel, in the case of *Baron's Lessee* v. *The Proprietaries*, for the South street lots, that of merely handing in a paper to the jury, by mistake, which was only a copy of an original produced at the trial. Suppose, in the present instance, the referees had adjourned, and in the intermediate time, meeting Innes in the street, should make the proposal mentioned to him—surely, this would not set aside the report. It is true, that the manner in which it was done, gave room for some suspicion, and the defendant had a right to presume, that all was not fairly conducted. But the fact is satisfactorily explained by the referees, and we do not think it such misbehavior as will invalidate the report. Therefore,

Let judgment be entered for the plaintiff.(*a*)

---

judgment at the third court (as if on a foreign attachment), and no further proceedings had on it, by appointing auditors, &c., does not raise such a presumption of collusion between the plaintiff in the attachment and the debtor, as to let in the judgment-creditor, was held under advisement." The cause was removed by *certiorari* to the supreme court, where the decision was in favor of the judgment-creditor. See the case, *post*, p. 450. It is to be remarked, that the question arose under the acts of 1723 (1 Sm. Laws, 158,), and 1752 (Id. 218), which have been altered and supplied by the act of Dec. 4, 1807 (4 Id. 478). This recent act provides (§ 4), that "the trustees shall be deemed vested with all the estate of the debtor *at the time of issuing the attachment*," a proviso which did not exist in the old acts; and therefore (independently of the general objections to the decision of the supreme court in this case), it may be doubted, whether the question would now be determined in the same way. See also, Welsh *v.* Murray, 4 Yeates 197.

(*a*) See Hagner *v.* Musgrove, Hollingsworth *v.* Leiper, and Chaplin *v.* Kirwan, *ante*, p. 88 161, 187; and the notes to those cases.

JAMES *et al. v.* ALLEN.

Insolvency.

A discharge of the defendant from imprisonment in New Jersey, by virtue of the general insolvent law of that state, was held not to entitle him to a similar discharge in this state, although the debt was contracted in New Jersey.

THE case was this :—The plaintiffs and the defendant had been concerned together in trade ; and upon settling their accounts, a considerable balance appeared against Allen, for the recovery of which an action was brought in the state of New Jersey, in May 1782 ; and judgment was therein obtained in November following, when a *fi. fa.* issued, and on return of *nulla bona* to that writ, a *ca. sa.* was sued out, returnable to May 1783. In the meantime, the defendant, on the 27th of April 1783, was arrested in Pennsylvania for the same debt, and gave bail ; but, on his return to New Jersey, he was
*189] there taken on the *ca. sa.* which *had issued in that state against him ; and afterwards, in October 1783, was discharged by their act of insolvency. A rule to plead had been entered in the action brought in Pennsylvania, at June term 1783, and judgment was signed for want of a plea, at the ensuing September term.

Bradford moved to set the judgment of this court aside, or to open it, in order to admit the defendant to plead the proceedings and discharge in New Jersey.

Upon the argument, it was stated, and agreed, that no person was entitled to relief under the insolvent law of New Jersey, who was not born in that state, or had not resided in it one year free from arrest; that a man indebted to any amount was entitled to the benefit of it; that a person not in execution was not excluded ; that the act requires notice to be inserted in the public papers of New York, if the debtor lives in East Jersey, or in those of Pennsylvania, if he lives in West Jersey; and that every debtor, who complied with the terms of the act, became thereby expressly discharged from all debts due at the time of the assignment of his effects for the use of his creditors, or contracted for before that time, and payable after, "so far as regards the imprisonment or detention of his person."

Bradford and *Lewis*, in support of the motion, contended, that the benefit and effect of the New Jersey law ought, in the present case, to be extended to Pennsylvania, as well by the general principle of the law of nations, as by the particular obligation arising from the articles of confederation.

1. They observed, that by the law of nations, every transaction, not yet completed, which has a view to its completion in a foreign country, must be determined according to the municipal law of that county: but, if perfectly complete in the country in which it originated, the *lex loci* that decided, must protect it in every other country where the validity of the transaction is called in question. 1 W. Black. 258 ; 2 Burr. 1078 ; Finch 186; 2 Show. 231. If the validity of a contract depends upon the laws of a foreign country in which it is perfected, and cannot be affected by any arguments drawn from the laws of the country where a subsequent action is brought, certainly, a judicial decision (which, like an act once in force, but afterwards repealed, vests a right in the party, though its immediate operation is impeded) cannot be otherwise expounded and enforced than by the

laws of the country where it is pronounced; and proceedings under the insolvent act amount to a judicial decision; for they determine a debt, and give a remedy. Sir T. Raym. 473. They might, indeed, be said to amount to more; as, in giving the creditor all the advantage of the debtor's effects, they become a species of execution, and therefore, may be considered a satisfaction. It is no small injustice, when a debtor has been compelled to assign all his effects, when he has given every satisfaction that he possibly can, to pursue his footsteps, on every change of situation, and commit him again and again into custody. If the suit in New Jersey had terminated in another manner, for instance, *by a verdict in favor of the defendant, [*190 that would clearly have been a bar to the action here.

2. But should the defendant find no protection under the law of nations, the 4th article of the confederation effectually supplies that defect. The article declares, that "full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." Now, if a judgment, or other judicial proceeding in New Jersey, had not been evidence before, this provision (to the true sense of which the law of Pennsylvania is subservient) would have made it so—if it was only *primâ facie* evidence before, this would render it conclusive. What Lord Mansfield declares in Doug. 5, to be the case with respect to certain courts in Westminster Hall (whose decisions and proceedings are unexaminable evidence), is also true, when applied to the several courts of justice in the states of the American Union; and the discharge in New Jersey may be carried about by the defendant into each of those states, as an impenetrable suit of armor to guard him from all future attacks upon his liberty, for a cause of action existing at the time it was granted.

The motion was opposed by *Coxe*, *Ingersoll* and *Sergeant*, who argued, that judgments in foreign courts were only *primâ facie* evidence, except in courts of admiralty, whose decrees were conclusive, because founded upon the law of nations, which is common to all the world; that as a judgment without satisfaction could not bar an action for the same debt in another country (3 Atk. 598), much less would the proceedings under the act in question, which did not extinguish, or even alter the debt; but only discharged the person of the debtor from arrest within the state of New Jersey. That this was entirely a municipal regulation, calculated to protect the inhabitants of New Jersey from their creditors in New York and Pennsylvania; to the inhabitants of which states, the citizens of New Jersey (owing to their having no sea-port, and paying an interest of seven per cent. for money) were constantly indebted; so that the extension of the act did not deserve to be favored here. That in the case of *Lopez*, in the court of appeals, and in the cause between *Connecticut* and *Pennsylvania*, depositions taken in Connecticut, according to one of their statutes, were not admitted to be read, because contrary to the common law. That the payment of interest for money lent, was the only instance regulated by foreign laws. That a certified English bankrupt was liable to arrest in Ireland. That, even if the validity of a foreign proceeding is admitted, a right to examine the ground upon which it was founded, remains; and therefore, that it might be proved, that the defendant was not entitled to the benefit of the act; as he was not a native of New Jersey, nor had he resided there one year previous to the

arrest. That, upon the whole, it would be extremely hard, after the creditors on the spot who, having joined in the petition according to the directions of the act, had shared the spoils, an absent creditor, who never knew of the discharge, should be barred.

*191] *SHIPPEN, President.—This is a motion, in effect, to discharge the defendant from execution, on the ground of his having been confined by a *ca. sa.* for the same debt, in the state of New Jersey, and there discharged as an insolvent debtor, by virtue of an act of assembly of that state: and the question is, whether the discharge of his person from imprisonment there, will entitle him to a like discharge here?

It is contended, that the decisions of even foreign courts of justice, shall have a binding force here; and that in the situation in which we stand with regard to New Jersey, a sister state, we are under an additional obligation to pay respect to the decisions of the courts there, by the terms of the articles of confederation.

The judgment of a foreign court establishing a demand against a defendant, or discharging him from it, according to the laws of that country, would certainly have a binding force here; and not only the decisions of courts, but even the laws of foreign countries, where no suits have been instituted, would, in some cases, be taken notice of here; where such laws are explanatory of the contracts, and appear to have been in the contemplation of the parties, at the time of making them; as if the interest of money should be higher in a foreign country where the contract was made, than in that where the suit was brought, the foreign interest shall be recovered, as being understood to be part of the contract. But it does not follow, that every order of a foreign court with respect to the imprisonment of the defendant's person, or any local laws of that country, with regard to his release from confinement, can have the effect of restraining us from proceeding according to our own laws here. The insolvent law of New Jersey relates not to the substance of the plaintiff's demand, which had already been established, but merely authorizes the court to make an order, on certain terms, for the discharge of the defendant's person from imprisonment; which order has no connection with the merits of the cause, and cannot with any propriety be called the judgment of the court in that action; and the law itself on which the order was founded, is a private act, made for that particular purpose; it is local in its nature, and local in its terms.

Insolvent laws subsist in every state in the Union, and are probably all different from each other; some of them require personal notice to be given to the creditors, others do not, as in the present case; and they have never been considered as binding out of the limits of the state that made them. Even the bankrupt laws of England, while we were the subjects of that country, were never supposed to extend here, so as to exempt the persons of the bankrupts from being arrested.

The articles of confederation, which direct that full faith and credit shall be given in one state to the records, acts and judicial proceedings of the others, will not admit of the construction contended for, otherwise, exe-

*192] cutions might issue in one state upon *the judgments given in another; but seem chiefly intended to oblige each state to receive the records of another as full evidence of such acts and judicial proceedings.

James v. Allen.

Whatever might have been the effect of an order or judgment of the court of New Jersey, if it had actually discharged the defendant from the plaintiff's *demand*, the present order, as well as the act of assembly on which it is founded, is local in its terms, and goes no further than to discharge him from his imprisonment in the jail of Essex county, in the state of New Jersey; which, if the fullest obedience were paid to it, could not authorize a subsequent discharge from imprisonment, in another jail, in another state.

The motion is, therefore, not granted.(*a*)

(*a*) The case in the text has been repeatedly cited, on questions arising under the insolvent laws of other states; and some erroneous views appear to have been entertained by the profession, respecting its operation and tendency, in consequence of the imperfect statement of facts contained in the report, and in some measure, from a misapprehension of the meaning of the learned judge, by whom it was determined. I am glad, therefore, that the authentic materials contained among the MSS. of President SHIPPEN, enable me to give a satisfactory explanation of the decision.

The proper title of the case is *James & Carson* v. *Samuel Alling*. The action in the state of New Jersey, was brought in the supreme court of that state, to May term 1782, and was founded upon a promissory note, drawn by the defendant in favor of the plaintiffs, and dated at Newark, in New Jersey, Nov. 16, 1780, for the sum of 353*l.* payable "on or before the 16th of December," following. On the 18th of November 1782, judgment was entered for the plaintiffs, by *nil dicit;* and, the damages having been assessed at 356*l.* 2*s.*, judgment was entered accordingly, on the 15th of February 1783. A *fi. fa.* then issued, and on the return of *nulla bona*, a *ca. sa.* was taken out, tested the 1st of April, and returnable the 2d Tuesday of May 1783; under which the defendant was committed.

The action in Pennsylvania, was brought in the common pleas of Philadelphia county, to June term 1783. The defendant was arrested on the 22d of April 1783, and gave special bail in due course. On the hearing of the motion to discharge him from the execution, the following copy of the record of New Jersey was produced.

State of New Jersey, } Samuel Alling, Junior, an insolvent debtor, now con-
Essex County, } fined in the jail of this county, having, pursuant to the act of assembly of this state, for that purpose made and provided, passed June 18th, 1783, presented to the inferior court of common pleas of said county of Essex, in the term of September 1783, a petition to said court, that he, the said Samuel Alling, Junior, might be discharged from his debts and confinement aforesaid, agreeably to said act, and the said Samuel Alling, Junior, having fully complied with the directions and requisitions contained in said act, in taking the oaths, advertising in the public newspapers, delivering in an account of his debts and credits, &c., and the majority in value of his creditors having appointed Col. John Noble Cumming, Captain Robert Nichols and Daniel Johnson, assignees of the estate of the said Samuel Alling, Junior, and a certificate having been produced, under the hand and seal of the said assignees, that he, the said Samuel Alling, Junior, had legally granted and conveyed, assigned and delivered up, for the use of his creditors, all his real and personal estate, both in law and equity, for the use of his creditors, as also all books and vouchers relative to the same, except the apparel, tools and implements of his trade or calling, and the bed or bedding adjudged to him by the court.

We, the subscribers, two of the judges of the inferior court of common pleas for said county, on this 23d day of October 1783, appointed for the purposes aforesaid, do hereby discharge the said Samuel Alling, Junior, from his imprisonment from the jail aforesaid; as witness our hands and seals, this 23d day of October, A. D. 1783.

WILLIAM BURNET, (L. S.)
JOHN PECK. (L. S.)

The act of New Jersey of June 18th, 1783 (Wilson's Laws, p. 338), under which the discharge took place, merely revived and continued, with some immaterial alterations, an act passed on the 21st of December, 1771 (Allinson's Laws, p. 356), entitled "An act for the relief of insolvent debtors." This act provided (§ 1), that *any* person, being a resident in the colony, might, "in conjunction with two-thirds of his creditors," present a petition to the supreme court, or to the inferior court of common pleas; and on his making an assignment of his estate to persons nominated by the creditors, it should be lawful for the court to discharge from imprisonment. Various regulations were enacted for the prevention of fraud, and the distribution of the assets among the creditors, and it was then (by the 12th section) declared, that "every such insolvent debtor, having given up all his or her estate, and conformed in all things to the directions of this act, shall for ever thereafter be discharged from *all debts* due at the time of the assignment, or contracted for before that time, though payable afterwards, so far as regards the imprisonment or detention of his or her person."

The remark made by President SHIPPEN, in the course of his opinion in the text, that "the law itself, on which the order of discharge was founded, is 'a private act made for that particular purpose,' it is local in its nature, and local in its terms," has led to a misunderstanding of the case, which seems to have been entertained even by Mr. Dallas, the reporter. In his Index, he gives the following syllabus of the decision in James *v.* Allen, "A person discharged by a *special* insolvent act of New Jersey, the act being local in its nature, and local *in its terms*, is not thereby protected from his creditors here." Now, there is nothing in the terms of the act which expressly limits its operation to the state of New Jersey, whatever may be the right of other states so to consider it; and it is certainly not a private act, in the sense in which that expression is usually received; since it was intended to apply to all persons who might happen to be in confinement for debt. The intention of the learned judge evidently was, to distinguish between laws which have an extra-territorial effect, and those which are purely private, as respects the state by which they are passed; and this appears from the MS. draught of his opinion in my possession, in which the passage runs thus: "the discharge of the defendant's person from imprisonment, is unconnected with the merits of the cause, and was pursuant to a law made there *for internal purposes*, local in its nature, and local in its terms."

The case of James *v.* Allen, thus explained, must be taken to have decided that a discharge of the person, under the general insolvent law of another state, did not entitle the party to a discharge from imprisonment in this state, although the particular debt for which he was imprisoned in this state, was contracted in the state in which he was discharged. And this is, undoubtedly, in accordance with the jurisprudence of most of the other states of the union. A different and less satisfactory rule has since been introduced, founded on the uncertain doctrine of comity, under which the insolvent is held to be entitled to a discharge on common bail, "unless the state in which the discharge was given refuses to extend the same courtesy to citizens of this state."[1] The inconveniences which have been found to attend this rule in practice, are so frequent and numerous, that regret has several times been expressed by the judges at its adoption.[2] A striking instance of its uncertainty as a standard, may be found in the decisions of the adjoining state of New Jersey. In Hilliard *v.* Greenleaf, 2 Yeates 534; it was stated by the counsel *arguendo*, that in the case of one Benezet, who had been discharged by the bankrupt act in Pennsylvania, the courts of New Jersey held his person to be exempted from execution. So, in the case of Rowland *v.* Stephenson, 1 Halsted 149, where the debt had been contracted in Pennsylvania, and the defendant discharged under the insolvent law of this state, the supreme court of New Jersey ordered an *exonerctur* to be entered on the bail-piece. In consequence of these decisions, the practice of the courts of Pennsylvania has been, to discharge on common bail, wherever a discharge has taken place under the insolvent laws of New Jersey. That

[1] *Per* C. J. TILGHMAN, in Smith *v.* Brown, 3 Binn. 201.

[2] See particularly what is said by C. J. TILGHMAN, in Walsh *v.* Nourse, 5 Binn. 385.

the law was not considered, however, to be entirely settled in New Jersey, appears from the remarks of Chief Justice KIRKPATRICK, in Vanuxem *v.* Hazlehurst, 1 South. 202, where he says: "The commonwealth of Pennsylvania might fairly discharge this defendant from the imprisonment of his person; for the imprisonment itself is but the mere mode of enforcing the contract, and no part of the contract itself. But then, this discharge of the person can have no force, but within the limits of the commonwealth," &c. And in the recent case of Wood *v.* Malin, 5 Halsted 208, the supreme court of that state, after full consideration, determined, in exact conformity with the principles of James *v.* Allen, that a discharge under the insolvent laws of another state did not entitle the party to be liberated on common bail in New Jersey, although the contract was made in the state where the discharge took place. This being now the general rule of New Jersey, it follows, that the practice of Pennsylvania must be changed, in order that the principle of reciprocity may have due operation. The dignity of the commonwealth, as well as the inconvenience, of the existing practice, seem to me to require that the rule of comity should be reconsidered, and some uniform and determinate principle adopted for questions of this kind, which are now of frequent occurrence.

The cases upon this subject are collected and reviewed in Mr. Ingraham's valuable Treatise on the Insolvent Laws of Pennsylvania (2d edition, p. 188–201); to which the reader is referred.

In a very recent case, with a note of which I have been favored by the chief justice, the supreme court of this state decided, that where a citizen of Maryland had made application in that state, for the benefit of their insolvent laws, in pursuance of which a provisional assignee had been appointed, a creditor, residing in that state, could not lay an attachment upon a debt due by a resident of Pennsylvania to the insolvent. The court holding that the attaching-creditor, was bound by the laws of Maryland, and consequently, estopped from gaining any preference inconsistent with those laws. Upon the question whether a creditor, not residing in Maryland, would have been concluded by these proceedings the court abstained from intimating an opinion. Mulliken *v.* Aughenbaugh, 1 P. & W. 117.

SUPREME COURT OF PENNSYLVANIA.

JANUARY TERM, 1787.

GREGORY'S Lessee *v.* SETTER.

Evidence.

Evidence admitted of declarations by a grantee, after the execution of the deed, that the purchase was made partly with the money of another.

EJECTMENT for a house and lot. The plaintiff's counsel offered to give parol evidence of the declaration of the grantee, made *after* the execution of a deed, and cited 2 Chan. Ca. 180; Gilb. For. Rom. 232, 233; 2 Atk. 71, 150.

It was opposed by the defendant's counsel, who admitted that parol evidence might be given of a declaration made *before*, or *at the time*, of the execution of the deed; but contended, that it was not admissible to prove a declaration *after;* and they cited 1 Atk. 447, 520; 1 State Laws 462; 2 Ca. in Chan. 180; 1 P. Wms. 111, 112; 2 Vent. 361; 1 Vern. 367; 5 Bac. 375; 2 W. Black. 1249, 1250.

BY THE COURT.—In this case, a deed was made of the house in question to Mrs. Gregory in fee simple; and evidence is offered to prove, that the purchase was made with the money of her deceased husband, part of which belonged to his children, and that the purchase was for their and her use. If she acknowledged this fact, at any time, it amounts to a confession against herself, which may certainly be given in evidence.(*a*)

Let the witness be sworn.

MORRIS *v.* FOREMAN.

Bill of exchange.

IT WAS RESOLVED in this case, upon a motion for a nonsuit:—1st. That the court will allow the plaintiff, in an action upon a bill of exchange, to strike out a special, as well as a general, indorsement on the bill. 2d. That a protest for non-payment must appear under a notarial seal; but it is not necessary that the non-acceptance should be certified in the protest; for,

(*a*) The same point was determined in German *v.* Gabbald, 3 Binn. 302.

that may be sufficiently established by other evidence. 3d. That the possession of a bill of exchange is evidence of an authority to demand payment of its contents.(*a*)

(*a*) This was an action by the *payee* of a bill of exchange, against the *drawer*. The bill was drawn upon a person in England, and there was a particular agreement between the parties, respecting the damages in case of protest. The plaintiff remitted it to his correspondents, Clifford & Tyset, in England, to collect for him on his own account; but with this indorsement, "Pay to the order of Clifford & Tyset." The bill being protested, this action was brought; and the indorsement appearing on the bill and protest, the defendant moved for a nonsuit, insisting that the action must be brought in the name of the indorsee; but the court sustained the action, and determined the points stated in the text. This explanation of the case was made by Judge BRADFORD, in Gorgerat *v.* McCarty, 2 Dall. 147 (also reported in 1 Yeates 94), which was an action by the payee against the *acceptor* of a bill which had been specially indorsed, when it was held, that possession of the bill and protest, was not sufficient to entitle the plaintiff to recover, without proof of a subsequent indorsee having received the amount. To the same effect was the decision of the circuit court of the United States, in Craig *v.* Brown, Peters' C. C. 171. But in Lonsdale *v.* Brown, 3 W. C. C. 404, in an action by the payee against the *drawer* of a bill, specially indorsed, it was held, that possession of the bill by the plaintiff was *prima facie* evidence of his right to recover. This decision was made on the authority of Clark *v.* The United States, 2 Wheaton 27. And see Zeigler *v.* Gray, 12 S. & R. 42.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

JUNE TERM, 1787.

GERARD *v.* LA COSTE *et al.*

Bills of exchange.

A bill of exchange payable to A., without the words "or order," or other words of negotiability, is not indorsable over, so as to enable the indorsee to maintain an action against the acceptors, in his own name.

THIS case came before the court on a special verdict, and after argument, the following judgment was pronounced by the President.

SHIPPEN, President.—This action is brought against the acceptors of an inland bill of exchange, made payable to Bass & Soyer, and indorsed by them, *after the acceptance*, to the plaintiff, for a valuable consideration. The bill is payable to Bass & Soyer, without the usual words "or order" "or assigns," or any other words of negotiability. The question is, whether this is a bill of exchange, which by the law-merchant, is indorsable over, so as to enable the indorsee to maintain an action on it against the acceptors, in his own name.

The court has taken some time to consider the case, not so much from their own doubts, as because it is said, eminent lawyers, as well as judges, in America, have entertained different opinions concerning it. There is certainly no precise form of words necessary to constitute a bill of exchange, yet, from the earliest time to the present, merchants have agreed upon nearly the same form, which contains few or no superfluous words, terms of negotiability usually appearing to make a part of it. It is indeed generally for the benefit of trade, that bills of exchange, especially foreign ones, should be assignable; but when they are so, it must appear to be a part of the contract,

*195] and the power to assign must be contained in the bill itself. *The drawer is the law-giver, and directs the payment as he pleases; the receiver knows the terms, acquiesces in them, and must conform.

There have doubtless been many drafts made payable to the party himself, without more, generally, perhaps, to prevent their negotiability. Whether these drafts can properly be called bills of exchange, even between the parties themselves, seems to have been left in some doubt by the modern

judges. Certainly, there are drafts in the nature of bills of exchange, which are not strictly such, as those issuing out of a contingent fund; these (say the judges in 2 W. Black. 1140) do not operate as bills of exchange, but when accepted, are binding between the parties. The question, however, here, is not, whether this would be a good bill of exchange between the drawer, payee and acceptor, but whether it is indorsable.

Marius's Advice is an old book of good authority; in page 141, he mentions expressly such a bill of exchange as the present, and the effect of it, and he says, that the bill not being payable to a man *or his assigns, or order*, an assignment of it will not avail, but the money must be paid to the man himself. In *Hodges* v. *Stewart*, 1 Salk. 125, it is said, that it is by force of the words, "or order," in the bill itself, that authority is given to the party to assign it by indorsement. In *Jordan* v. *Barloe*, 3 Salk. 67, it is ruled, that where a bill is drawn payable to a man, "or order," it is within the custom of merchants; and such a bill may be negotiated and assigned by custom *and the contract of the parties.* And in *Hill* v. *Lewis*, 1 Salk. 133, it is expressly said by the court, that the words, "or to his order," give the authority to assign the bill by indorsement, and that without those words the *drawer* was not answerable to the indorsee, although the *indorser* might.

An argument of plausibility is drawn in favor of the plaintiff, from the similarity of promissory notes to bills of exchange. The statute of 3 & 4 *Anne* appears to have two objects; one to enable the person to whom the note is made payable, to sue the drawer upon the note, as an instrument (which he could not do before that act), and the other to enable the indorsee to maintain an action in his own name against the drawer. The words in this act which describe the note on which an action will lie for the payee, are said to be the same as those on which the action will lie for the indorsee, namely, that it shall be a note payable to any person, or his order; and it appearing by adjudged cases, that an action will lie for the payee although the words "or order" are not in the note, it follows (it is contended), that an action will also lie for the indorsee, without those words. If the letter of the act was strictly adhered to, certainly, neither the payee nor indorsee could support an action on a note, which did not contain such words of negotiability as are mentioned in the act; yet the construction of the judges has been, that the original payee may support an action on a note not made assignable in terms. The foundation of this construction does not fully appear in the cases, but it was probably thought consonant to the spirit *of the act, as the words "or order" could have no effect, and [*196 might be supposed immaterial, in a suit brought by the payee himself against the maker of the note. But to extend this construction to the case of an indorsement, without any authority to make it, appearing on the face of the note, would have been to violate not only the letter but the spirit of the act. Consequently, no such case anywhere appears. On the contrary, wherever the judges speak of the effect of an indorsement, they always suppose the note itself to have been originally made indorsable. The case of *Moore* v. *Manning*, in Com. 311, was the case of a promissory note originally payable to one and *his order;* it was assigned, without the words "or order" in the indorsement; the question was, whether the assignee could assign it again; the chief justice, at first, inclined that he could not, but it was afterwards resolved by the whole court, that if the bill was originally assignable, "as it

will be (say the court), if it be payable to one and *his order*," then to whomsoever it is assigned, he has all the interest in the bill, and may assign it as he pleases. Here, the whole stress of the determination is laid upon what were the original terms of the bill, if it was made payable to one and *his order*, it was assignable, even by an indorsee, without the word "order" in the indorsement; it follows, therefore, that if the bill was not originally payable to order, it was not assignable at all. The same point is determined for the same reasons, in the case of *Edie & Laird* v. *East India Company*, in 1 W. Black. 295, where Lord Mansfield says, "the main foundation is to consider what the bill was in its origin; if, in its original creation, it was a *negotiable draft*, it carries the power to assign it." In a similar case, cited in Buller's Nisi Prius, 275 (*Rex* v. *Morris*), the court held, that as the note was in its original creation *indorsable*, it would be so in the hands of the indorsee, though not so expressed in the indorsement.

These cases leave no room to doubt what have been the sentiments of the courts in England upon the subject. To make bills or notes assignable, the power to assign them must appear in the instruments themselves; and then, the custom of merchants, in the case of bills of exchange, and the act of parliament, in the case of notes, operating upon the contract of the parties, will make them assignable.

In the case before us, no such contract appears in the bill. The acceptance was an engagement to pay according to the terms of the bill to Bass & Soyer; a subsequent indorsement, not authorized by the bill, cannot vary or enlarge that engagement, so as to subject the acceptor, by the law-merchant, to an action at the suit of the indorsee.

Judgment for the defendant.(*a*)

---

*197] *SHOEMAKER *v.* KNORR.

Amendment.

The *teste* and return of an *alias venditioni exponas* were allowed to be amended by the *præcipe*.

JUDGMENT: *fi. fa.* returned, and *vend. exp.* to Dec. term 1786, returned by the sheriff, "proceedings stayed by the plaintiff." The sheriff afterwards made sale of the premises, and the plaintiff took a *præcipe* from his attorney, for an *al. vend. exp.* returnable to March term 1787, but before the return-day of the term, the sale had been made, although the *præcipe* was not delivered, and no writ made out until after the term, when the prothonotary, on the application of the sheriff, issued an *alias vend. exp.* returnable to June term.

It was now moved to alter the *teste* and return, by the *præcipe*; that is, to make the writ returnable at March, instead of June term.

(*a*) In Barriere *v.* Nairac, 2 Dall. 249, which was an action by the indorsee, against the maker of a promissory note, judgment was arrested, after a writ of inquiry of damages returned, because it appeared from the declaration, that the note was drawn in favor of the payee alone, without the words "or order." And see Waters *v.* Millar, *post*, p. 369, where it was held, that an action could not be maintained against the maker of a note payable to order, on the mere sale and delivery of it, without an indorsement or assignment.

Sergeant, the defendant's attorney on record, did not oppose the motion, but declared, that as his authority was determined by the judgment, his consent could not be obligatory on his client.

THE COURT, after some deliberation, granted leave to make the alteration moved for; resting, it seemed, upon the ground that the *præcipe* furnished something to amend by.(*a*)

Rawle, for the plaintiff. *Sergeant*, for the defendant.

PHILE, *qui tam*, *v.* The Ship ANNA.

Forfeiture of vessel.

Under the act of assembly of 1787, a vessel was liable to forfeiture, in case goods were unladen from her, before due entry, whether the owners were privy to the transaction, or otherwise.

THIS was an information filed by the Naval Officer of the port of Philadelphia, against the ship Anna, lately arrived from Bristol, upon the discovery of Peter Cooper, that forty-two hampers of porter, part of her cargo, had been landed, without being duly entered at the collector's office, conformable to a law of this state, passed the 15th day of March 1787 (P. L. 241), which enacts, among other things, "That every vessel or boat, from which any goods, wares or merchandise shall be unladed, before due entry thereof, at the office of the collector of the port of Philadelphia, and every carriage into which any such goods shall be first put or loaded, after removal from such vessel or boat, together with the horse, horses or cattle drawing the said carriage, at the time of seizure, shall be forfeited, and seized by the collector last aforesaid, or the naval officer, or any of his or their deputies, &c." It appeared in evidence to the jury, upon the part of the informants, that the master of the Anna, had only exhibited twenty hampers of porter in his official manifest, whereas, a much greater quantity was found on board the ship, besides forty-two hampers landed and deposited in the store of one Smith, and twenty-four hampers actually delivered on shore to the master himself, agreeable to his orders given for that purpose in the store of the claimants. It was proved, likewise, that a considerable number of hampers of porter, had, during the passage, been removed from the *hold, and stowed away in the state-rooms, filling from the floor to the ceiling, so that any person who was in the least attentive, must [*198 have observed them, upon entering the cabin; and it appeared, that the owners and their agent had been several times on board before the seizure, and before the removal of the hampers from that situation. The customary privilege of a master in the Bristol trade was described to be limited to one ton, and the gross number of the hampers of porter discovered by the informants, was computed to amount to a little more than eighteen tons. The mate, who, the claimants alleged, was the delinquent on this occasion, had been retained in their service, on board the ship, for two or three weeks after the seizure; but he had lately absconded, under the apprehension of a prosecution for the penalty of 500*l.*

(*a*) Baker *v.* Smith, 4 Yeates 185; Berthon *v.* Keely, Id. 205; Black *v.* Wistar, 4 Dall. 267.

For the claimants, it was given in evidence by a passenger, that he was told by the mate of the Anna (who, it seems, was a man of some property), that he had clandestinely shipped a quantity of porter, which he intended to dispose of here, without paying the freight to the owners, or the duties to the state, and which he had an opportunity of doing, even without the master's knowledge, as it was the custom for mates to superintend the loading and unloading of the vessel. The witness had likewise, during the passage, purchased a dozen of porter from the mate, who then solicitously requested that the circumstance might not be communicated to the master; and who (as several witnesses proved), after his arrival at Philadelphia, had treated with several persons for the sale of porter, repeatedly informing them that it was his private adventure, and that the owners of the vessel had not a bottle on board. When the hampers were removed, at sea, from the hold into the cabin, the master, who had long been indisposed, was then particularly sick, owing to his exertions during a storm that had happened the preceding night; and the father of one of the owners, who had taken charge of the vessel upon her arrival, affirmed that he did not, while in the cabin, observe the hampers that were stowed away in the state-rooms; that he had been very cautious in directing the manifest to be made out according to the invoices and bills of lading, and that he had personally enjoined all the officers of the ship, not to land a single article without a regular permit from the collector. It was in proof, likewise, that a hamper of porter which the sailors were hoisting out of the hold, was hastily let down again, upon the appearance of one of the owners.

The evidence on both sides being stated, the counsel for the claimants, Messrs. *Rawle*, *Sergeant* and *Lewis*, argued, that the present question was of the greatest importance to the commercial interests of the country, as it was now to be determined, whether an innocent owner of a ship was responsible for all the unwarrantable actions of her officers and crew? A rigid construction of the law upon which this prosecution is grounded, cannot fail, indeed, to counteract the object of the legislature in framing it; as
*199] the attempt to secure our revenues by indiscriminately *inflicting upon the unoffending merchant, the penalties resulting from the illicit practices of his master, will so multiply the risks of commerce, that the hope of gain, and the ardor of enterprise, must cease to operate, and in the eventual loss of trade, will be involved the total dissolution of the impost system. We should, therefore, be particularly cautious what principles we establish, at this crisis of our commerce; and, in imitation of the wise precedents transmitted to us by our ancestors, we should so interpret the letter of the law, as to render its operation reasonable and just, the source of punishment to the guilty, but of certain acquittal to the innocent. In the present case, it has been fully demonstrated, that the claimants were not interested in the commodity which has been surreptitiously introduced into this city, and that so far from knowing and consenting its the fraud, the utmost vigilance and circumspection were exercised on their behalf to prevent it. The questions then, to be now considered, may be fairly comprehended in an inquiry—How far the property of the owners is liable to confiscation, for the misconduct of their officers and crew; and whether, by a liberal construction of the acts of assembly, the ship itself, under all the circumstances appearing in evidence, is a subject of forfeiture?

1st. It must be admitted, as a general rule, that the master is responsible for the agency of his servant, while acting in that capacity; but, on the other hand, the moment he steps aside from the line of his duty, this relative responsibility is at an end. Thus, if a drayman, in drawing a pipe of wine, staves it, his master must certainly indemnify the owner to the value of the wine that is lost; but if he leaves his dray, engages in a quarrel, and does an injury to his antagonist, neither law nor justice will transfer the damages to his master. So, likewise, if a farrier's journeyman lames a horse in shoeing it, an action lies against the master, not against the servant; but still, in this, and in every similar instance, the damage must be done, while he is actually employed in the master's service, otherwise, the servant answers for his own misbehavior. It is, therefore, readily agreed, by analogy to the principles thus established, that the claimants are responsible for the conduct of their officers, so far as it respects the business of navigation, and the cargo of the ship; but in no other view can the master be considered as their agent, and, consequently, on no other account, can they be affected by his transactions. What then is understood by the term cargo? The privileges allowed to the mariners are not surely to be comprehended in the description; and if a master or a mate clandestinely exceeds his privilege, this ought not in justice to be a ground for altering the case. The meaning of the word cargo must, therefore, be restricted to such goods, wares and merchandise as belong immediately to the owners of the ship, or such as yield them a profit upon freight. Now, it is in evidence, that the porter, landed from the Anna, did not belong to the owners, and that they were not to receive any profit upon the freight of that article; it was, consequently, no part *of her cargo; it had not been intrusted by the claimants to the superintendency of the master or any other person on board; and therefore, it cannot be said, that the entry was neglected by "them, their agents, factors or consignees," which is expressly required by an act of assembly (and all the laws upon the subject must be taken together), in order to work a forfeiture. If this discrimination is disregarded, what vigilance, what precaution, can protect the property of the most upright merchant from confiscation? The tobacco pouch of a sailor, or the secret till of a passenger's chest (for, according to the construction urged by the informants, the most trifling article is sufficient for their purpose), may contain the instrument of ruin, and it would be in vain to show, that the sufferer was ignorant of the fraud, and diligent to prevent it, while *ita lex scripta est* furnishes the ready, but harsh, answer to the sincerity of his plea. With respect to the cargo then, it is admitted, that, however improper the master's conduct may be, it will affect his owners, even without their knowledge or connivance; but for anything beyond the cargo, and such we allege is the commodity which gives rise to the present litigation, their knowledge is, at least, requisite, in reason, justice, and in law too, before they can be condemned to make atonement for his offences. [*200

2d. It has been already said, that laws should be so construed as to prevent an injury being done to the innocent; and accordingly, a multitude of cases are to be found, in which the force of the expression has been rejected, when evidently contrary to reason and justice. There was a law, that those who in a storm forsook the ship, should forfeit all property therein; and the ship and lading should belong entirely to those who stayed in it. In a

dangerous tempest, all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance, the ship came to port: the sick person kept possession and claimed the benefit of the law. Now, here, all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither stayed in the ship upon that account, nor contributed anything to its preservation. Again, there was an edict which condemned any man to death, who should scale the walls of a certain city. One who had discovered the approach of an enemy, got over the wall at night, in order to give the alarm. He was afterwards tried under this law, and, though the case came manifestly within the words, his judges pronounced, that it could not be the intention of the legislature to punish an action that proceeded from such meritorious motives; and therefore, they acquitted him. But we have a memorable instance, of a more recent date, arising from an ordinance of congress, which declared, that any vessel conveying goods, &c., to the enemy, should be subject to capture and condemnation. A Dutch vessel, called "the Golden *Rose," had been taken by a British cruiser, and
*201] while her captors were carrying her into New York, she was retaken by an American privateer. It was seriously contended, upon that occasion, that the Dutch vessel was a lawful prize, according to the words of the ordinance; but the court would not allow so extravagant a claim, grafted upon the strict letter, to pervert the politic but equitable meaning of the act of congress. Let us then try whether the acts of assembly, on the subject in discussion, may not, by a liberal interpretation, operate so as to relieve the claimants from the injury with which they are threatened, and at the same time, promote the rational views of the legislature. In the section upon which the informants proceed, it is said, "that every vessel or boat, from which any goods, wares or merchandise shall be unloaded, before due entry thereof, &c., shall be forfeited." Here, then, if we understand the word "thereof" to refer to the entry of the vessel, though it may produce a slight deviation from the grammatical relation to the next immediate antecedent, we shall certainly give a more reasonable and benevolent explanation to the law, than by making the vessel liable to forfeiture, for the non-entry of the goods, wares and merchandise. By the first construction, a duty is imposed upon the owners, with which it is in their power to comply; by the second, they are exposed to loss and ruin, for the negligence or malversation of others, which they could not foresee, and cannot prevent. The ship, and its contents, are indeed distinct things, in their nature, and may thus be rendered (as they ought to be) distinctly responsible for the management of those to whom they are intrusted. If the ship is not entered, let the penalty fall there; and if the cargo is not entered, let that be doomed to confiscation; but the idea of making them reciprocally responsible, is contrary to natural justice, and must be incompatible with sound policy. No foreign merchant will trust his vessel in our ports, and no citizen of Pennsylvania will be hardy enough to engage in commerce, upon such precarious terms. But it is to be further observed, in this place, that the legislature having changed the expression, we may justly infer, that the object of the law was likewise changed. In the preceding act relative to the impost, the words "ship or

vessel" are employed, and not "vessel or boat," as in the section above cited; it is, therefore, to be presumed, that it was only in contemplation to destroy the petty fleets of smugglers which infest our creeks and rivers; and as it is a maxim in law, that "a statute treating of things or persons of an inferior rank, cannot, by any general words, be extended to those of a superior," a *ship*, which in maritime affairs is of the highest order, cannot be designated by the subordinate title of a *vessel*.

There is, however, an additional and very forcible argument, to show that the informants are not entitled to a verdict of condemnation against the Anna, which is drawn from the regularity of the entry that has been made. By the act of assembly, in which this *cause originates, no form of entry is prescribed; we must, therefore, apply for instruction to the preceding impost law, which directs "the master of any ship or other vessel to exhibit to the collector a true manifest, signed by him, of all the goods, wares and merchandise imported in such ship or vessel;" and after sundry other regulations, calls upon him to make oath, "that the manifest faithfully states the respective goods, wares and merchandise, therein mentioned, and that no other is laden or imported in his vessel, to the best of his knowledge or belief." Has any of the requisites to constitute a formal entry been neglected by the master of the Anna? It appears, that he has, in due season, exhibited an official manifest, and that he has sworn to the truth of its contents. This is surely all the law exacts, at least, for the discharge of the ship; and though the omission of any article may be a cause for forfeiting that article (as it has already happened with the porter upon this occasion), and may likewise be a proper foundation for a charge of perjury, it cannot be extended, to divest the property of an owner, who had not practised any deceit himself, and who could not derive any advantage from the deceit practised by another. [*202

The counsel for the informants (Messrs. *Ingersoll* and *Bradford*), in reply to the preceding arguments, stated: That the determination of this cause would certainly produce consequences of an important nature, and either render the act of assembly upon which it is founded, a dead letter, or a productive instrument of public revenue. In governments differently constituted, where regal pageantry, or military force, can invite or compel respect and obedience to the law, little danger is to be apprehended from the occasional indulgence of learned men in their ingenious and novel comments upon the sense and expressions of the legislature; but under a democratical constitution such as ours, should the people acquire a habit of yielding to logical subtleties and specious declamation, there is no power to control the evil that must ensue; the principles of jurisprudence would become weak and fluctuating, and the virtue and dignity of the commonwealth would be contaminated and eventually destroyed. Instead, therefore, of considering how to escape from the strong expression of the act before us, it is our duty to give it the fullest operation that is necessary for suppressing the mischief to which the legislative attention was originally directed; and here we cordially embrace the position of our antagonists, that the meaning of those who framed the law, is the best guide to direct us in carrying it into execution. What then was the evil complained of, at the time that this act was made? The atrocious frauds committed upon the revenue. What was the remedy provided? It could not be merely the forfeiture of the smuggled

goods, as the claimants insinuate, for that was imposed by an antecedent law; but the truth is, that every other penalty having proved ineffectual. this statute was enacted, expressly to superadd the forfeiture of the vessel or boat from which the goods should be clandestinely unladed. But here it is
*203] remarked, that the *legislature has changed its language, and therefore, it has changed its object. It would be idle, indeed, to attempt by argument to prove that a *vessel* is a term sufficiently comprehensive to describe *a ship*—but surely the sequel of the same law must remove every doubt, when it enacts, that "where forfeiture of the *ship*, vessel, boat, &c., shall have been incurred, the naval-officer and his deputies may seize the same." Again, it is said, that by dispensing with a rule in grammar, it will appear, that the neglect to enter the vessel herself, is the sole circumstance which exposes her to forfeitnre. But if this construction is allowed, it follows, that every boat, as well as every ship, must be duly entered at the collector's office, for the sentence will then run in this way, "every vessel *or boat*, which, before due entry *thereof*, shall unlade, &c."—a position that is necessarily defeated by its own absurdity.

The claimants, pursuing this curious system of defence, have not only endeavored to persuade us that the porter was no part of the cargo, but likewise that one hundred and thirty-two hampers (which was the gross quantity contained in the ship) make a mere trifle, too insignificant to produce a forfeiture. To these ideas, how is it possible to oppose a serious refutation? The understanding of mankind is not, at this day, to be deceived by a distorted definition of words, nor will mere assertion be allowed to overthrow the strong evidence of the senses. Confine the meaning of the term *cargo*, according to their suggestion, to such goods, wares and merchandise as belong immediately to the owners, or such as yield them a profit upon freight, and it may happen, that the ship shall be deeply laden, and yet it will be said, that she had no cargo on board—a paradox not readily to be comprehended! But whence is derived this gigantic notion of things, through the medium of which the quantity of eighteen tons is considered as *a trifle?* No, this is not an insignificant article, easily to be secreted; it cannot be squeezed into a sailor's tobacco-pouch, nor stowed in the private till of a passenger's chest. We find that it occupied a considerable space in the hold of the ship, that it filled the state-rooms from the floor to the ceiling; and, besides the amount of the freight and tonnage, it ought to have contributed more than eighty pounds to the revenues of the state.

It is boldly said, likewise, that such an entry has been made, as is sufficient to satisfy the law, and to prevent a forfeiture of the ship. The master of the Anna has exhibited a manifest, it is true—but is it not a partial statement? and can the accuracy of the form compensate for the fraudulent omission of a substantial item?

But the master has sworn to the truth of the manifest—and can his perjury cure the evil, which his malversation has introduced? This naturally calls for some observations upon the leading principle used on behalf of the claimants, to wit, their innocence, and total ignorance of the transaction, which has involved them in this prosecution. It is not necessary, and therefore, it will not be attempted, to press the circumstances which raise
*204] a presumption, that the *claimants were either acquainted with the conduct of their officers, or were guilty of the grossest negligence: but it

should be remembered, that they might have seen the porter on board the ship, if, as their own witness expressed it, they had chosen to look—that the contraband unlading took place at their wharf, and but a few yards distant from their counting-house, that it was a matter known to every sailor on board the ship, and that the mate, who is supposed to have done them so severe an injury, was retained in their service for two or three weeks after the seizure. Still, however, the innocence of the claimants has no connection with the present question, which depends upon this single issue, whether the allegation contained in the information is, or is not true?—in other words—whether forty-two hampers of porter have been unladed from the ship Anna, before they were duly entered at the collector's office? Much declamation, indeed, has been exercised upon this proposition, "that the innocent ought not to suffer for the guilty:" but, however just it may be, in the abstract, the state of society necessarily introduces many striking exceptions. Thus, if a carrier is attacked by robbers, and, after a brave defence, is overpowered, notwithstanding his innocence and his misfortune, he is still answerable for the goods of which he was plundered; nay, if his master, on whom no shadow of blame could possibly be reflected, is called upon, he must render to the owner a full indemnification. Again, if a man lends a piece of furniture to another, which is distrained with the goods of the borrower, for arrearages of rent, is there anything culpable in his conduct? and yet the law works a forfeiture of his property, to satisfy the demands of the landlord. How many virtuous wives suffer for the depravity of their husbands—how many inoffensive children, for the dissipation of their parents? In short, the relative obligations of social life are such, that we may trace the fortunes and happiness of mankind to a dependence upon the actions of each other, in almost every sublunary station—but in none is it more observable than in the important connection between master and servant. From every book that treats upon the subject, as well as from daily experience, we find, that the master is responsible for the actions of his servant, the owner for the agency of his captain; but we shall readily concur with our antagonists in acknowledging, that this responsibility continues only while the servant or captain is engaged in the business of the master or owner.

What then is the present case? The law requires the master of any ship or other vessel to exhibit a true manifest, upon oath, to the collector of the port—does it not consequently become his duty to do so? and is not his neglect or evasion in this respect, a neglect or evasion committed, while in the actual transaction of the owner's business? Upon their own construction, therefore, the claimants are liable; and it is unnecessary for us to prove, as we could do, that had the fraud been perpetrated, even by the sailors, a forfeiture of the vessel would have ensued. In England, the owners, [*205 to the utmost *extent of their fortunes, were likewise amenable for the conduct of the mariners they employed, until an act of parliament interfered, and limited their responsibility to the value of the ship and cargo. In Pennsylvania, a late determination has recognised the doctrine for which we contend;(*a*) and Capt. Angus, and the owners of the vessel which he commanded, have in vain pleaded their innocence and ignorance of the malpractice of others, to excuse them from the resulting damages. Such, after all,

(*a*) Purviance *v.* Angus, *ante*, p. 180.

is the law—and it can be no ground for counteracting the evident intention of the legislature, that the claimants have been deceived by the persons to whom they have, perhaps, too implicitly confided their interests.

The President delivered the following charge to the jury :

SHIPPEN, President.—This is an information exhibited against the ship Anna, as being a vessel from which forty-two hampers of porter were unladen, without a previous entry at the collector's office. The evidence on the part of the informants proceeds from several witnesses, one of whom discovered the drays going from Clifford's alley, and pursued them to Smith's, where the porter was lodged. Two porters have proved the unlading and the seizure ; and by the manifest, it appears, that only twenty hampers were entered, though forty-two were carried to Smith's, twenty-four to the captain's store, and above fifty remained on board the ship : so, the evidence is full and clear, that more goods have been unladed, than were entered with the collector. The claimants, on the other hand, have filed their claim, and say, that no act has been done, which, under the laws of Pennsylvania, incurs a forfeiture. This, therefore, is the province of the jury to try and determine.

The words of the act of assembly upon which this prosecution is grounded, have been the subject of animadversion on both sides ; but as they are few, we will repeat them. "Every vessel or boat, from which any goods, wares or merchandise shall be unladed, before due entry thereof at the office of the collector of the port of Philadelphia, &c., shall be forfeited." Some doubts have been raised with respect to the thing meant to be entered ; but the subject-matter of the act plainly refers to "goods, wares and merchandise ;" and it would be highly absurd, if taken otherwise, as boats are never entered. This act does not say what shall be a due entry, but the next preceding one requires, that "the master of any ship or vessel shall exhibit to the collector a true manifest of the goods, wares and merchandise imported in such ship or vessel, &c., and swear that there are no other on board, to the best of his knowledge and belief." It has been suggested, that the master having delivered in a manifest, and sworn to it, this duty is done, and that in case of an omission, only the goods omitted are to be forfeited. But if the master is obliged by law to deliver in a manifest, he does not comply, unless he exhibits a true and accurate one ; and his committing perjury upon the occasion, so far from saving the vessel, must greatly increase the offence.

*206] This has been repeatedly called a hard law ; but the truth *is, that revenue laws are of a harsher nature than any others, and necessarily so ; for, the devices of ingenious men render it indispensable for the legislature to meet their illicit practices with severer penalties.

Thus, if the sheriff has a writ against any man, he cannot break open his door to execute it—but if liquor is smuggled into a cellar, the law says it is better that an individual should suffer in his personal privileges, than that the public should be cheated of its duties ; and therefore, allows the officer to force locks, &c., in order to make a seizure : in the first case, between citizen and citizen, a man's house is considered as his castle; in the second, between the public and the private character, it is no longer regarded in that sacred light. We do not mean, however, to reflect on laws of this description; we know they are necessary, as every society stands in need of

assistance from its members. If the end can be accomplished, without infringing the private rights of the subject, it is so much the better; but, at all events, the exigencies of government must be satisfied. It has been said, that, if the law is enforced, as the informants contend for, the merchants will not be safe, no foreign vessels will be sent to our ports, and, eventually, the revenue must fail. But, nevertheless, it is requisite that such laws should be strictly worded, though, undoubtedly, there are cases where the construction of the words must be such, as to prevent more injury being done than was intended. The navigation act of England says, that goods imported as merchandise shall be forfeited, if they do not pay a certain duty; and the case in 2 Strange 943 (*Chapman* v. *Lamb*), is a seizure of shirts, night-gowns and caps, under this law. It was there argued, that the word "goods," would certainly include those articles, but the judges were of opinion, that it could not be the meaning of the legislature, to make wearing-apparel subject to forfeiture. The case in Bunbury is the single one that reaches the point before us.[1] There, the question arises, whether goods put on board secretly, and unladen without the knowledge of the master, would occasion a confiscation; and the judges agreed, that if it was a small matter, and no part of the cargo, it would not. The claimants therefore, to have the benefit of this case, should show: 1st. That the subject of the present prosecution, is a small matter: 2d. That it was no part of the cargo: and 3d. That it was smuggled, without the knowledge of the master.

1st. Then a *small matter* is an indefinite phrase, not to be ascertained by mere words, but by the evident meaning of the judges who used it; and from that criterion, it should seem to be a trifling thing, easily concealed, and which might fairly escape the notice of the master; but it cannot be extended to large and weighty goods, deposited in the hold of the vessel and which then constituted a part of her cargo.(*a*) 2d. The counsel for the informants have suggested, that only such goods as belong to the owners, or yield them a profit upon freight, can be called a *cargo;* whereas, in truth, the cargo is the lading of the vessel, and, though by bribery or craft, some articles *might be introduced into the hold, without the knowledge of the owners, or the master, yet everything which is put on board [*207 the vessel, is, in general, comprehended in that description. But 3d. The knowledge of the master is here proved by strong presumption. The quantity of porter that was put on board, the removal of it at sea, the evidence of the delivery of twenty-four hampers at his store, and by his order, are circumstances from which, we suppose, the claimants themselves did not think his ignorance of the transaction tenable.

Then, there remains only the great point upon which the counsel for the claimants seem chiefly to rely, to wit, their innocence and ignorance, with respect to the fraud that has been committed. There is no evidence, indeed, that tends to show, that the owners of the ship meant to do anything unfairly; bnt, on the contrary, that the mate brought the goods hither with the avowed intention to defraud them, as well as the state. The question then recurs, what difference does it make, whether they knew it or not?

(*a*) See Vasse *v.* Ball, 2 Dall. 273, 276.

[1] Greeby *v.* Palmer, Bunb. 232, n.

Here is a positive law that directs a due entry of all goods, wares and merchandise imported into this state, under certain penalties, and one of them is the forfeiture of the vessel or boat from which they are unladed. It does not speak of the knowledge of any person, but seems to be studiously worded to avoid that construction. It is not a novel law, though perhaps it is stricter now than formerly: for, in England, it has long existed, and before the revolution, it was known in Pennsylvania. The legislature has thought that nothing else would answer, and the judges and the jurors are equally bound to obedience. If, indeed, the law was doubtful or latitudinal, admitting one interpretation, which would be just, and another which would be unjust, it would become us to prefer the former. But if the policy of the legislature seems to bear hard on the subject, we are not to judge, and determine upon its propriety (that is a matter for the deliberation of those who made the law), and however unjust it seems, we must acquiesce, or there must be a dissolution of society. It must certainly affect every humane man to see the innocent suffer; but in society this is not strange or uncommon; and the distinction may properly be taken between criminal and civil cases. The law never punishes any man criminally but for his own act, yet it frequently punishes him in his pocket, for the act of another. Thus, if a wife commits an offence, the husband is not liable to the penalties; but if she obtains the property of another, by any means, not felonious, he must make the payment and amends. There are a variety of other instances, in which men are responsible for one another, in consequence of their connection in society. The drayman, if he drives over and kills a child, must himself suffer the judgment of the law; but if he staves a pipe of wine, his master must make the compensation. Upon the whole, it is neither a hard nor a novel case, since men must occasionally employ others to act for them, and ought to answer for those in whom they confide. If the legislature has thought proper to subject the owners to this forfeiture, we must submit. With the jury, therefore, the *208] power is happily lodged, *which was formerly exercised by a single judge, and it is their duty finally to acquit or condemn the ship, as in their consciences they think ought to be done.

The jury, after a short adjournment, returned a verdict in favor of the informants.(a)

(a) See Vasse *v.* Ball. 2 Dall 270; s. c. 2 Yeates 178; Perot *v.* United States, Peters C. C. 256; United States *v.* The Hunter, Id. 10; United States *v.* Cave, 3 Hall's Law Journal 176; Case of Le Tigre, 3 W. C. C. 567.

[1] By the general maritime law, vessels are made responsible for the unlawful acts of their masters and crews; and this extends even to forfeitures by positive law. United States *v.* The Malek Adhel, 2 How. 210; Smith *v.* Maryland, 18 Id. 76–6; The Siren, 7 Wall. 152; Dobbins' Distillery *v.* United States, 96 U. S. 400.

JANUARY, assignee, *v.* GOODMAN.

Specialty.—Evidence.

An instrument, by which the defendant promised and obliged himself and his heirs to pay to the plaintiff and his assigns, concluding with the words, "as witness my hand and seal," and actually sealed, is a *specialty*, and cannot be given in evidence to support an action of *assumpsit*.

Where there are subscribing witnesses to an instrument, whether sealed or not, they must be produced or accounted for, before the handwriting of the maker can be proved.

THE President, after argument and consideration, delivered the judgment of the court in this cause, upon a point reserved at the trial.

SHIPPEN, P. J.—This is an action on the case, brought upon a writing said to be a promissory note, and declared upon as such. The form of it is not the usual form of a promissory note; it runs thus: "I promise and oblige myself and my heirs to pay to January and his assigns," it concludes with the words "as witness my hand and seal; and it *is actually sealed.* Two witnesses subscribe, under the words, "given in presence of us."

On the trial, the subscribing witnesses were not called, nor any evidence given of their death or absence; but evidence was offered of the handwriting of the defendant who subscribed the instrument, which was permitted to be given in evidence, on reserving the point.

In this case, two questions arise; one regards the *nature of the instrument;* the other, the *sufficiency of the evidence.*

1. If the instrument is a *specialty*, then it ought not to have been given in evidence, in an action of *assumpsit* on a promissory note. This general doctrine is not denied; but, it is said, it is not to be considered as a specialty or deed, unless proof be made of its having been sealed and delivered as a deed; and that no such proof appearing, the plaintiff had a right to consider it as a note of hand. That a deed cannot be regularly proved, but by proving the sealing and delivery, there can be no doubt; as if *non est factum* be pleaded to a bond, the plaintiff must prove the sealing and delivery—this proof *lies upon him.* But, in the present case, the proof of the execution of the instrument as a deed, is attempted to be put upon the person against whom it is produced. The plaintiff produces an obligation to support an action on a note—shall he say, against his own showing, that unless you, the defendant, prove this to have been sealed and delivered, it is no obligation, and I may consider it as a note? The plaintiff himself will not prove it, and the defendant cannot. The instrument produced has the formal words of an obligation; it binds the party and his heirs to pay to another and his assigns. The words, "as witness my hand and seal," show the intended nature of the instrument, and it actually appears with a seal; this denominates it a specialty. The definition of a specialty is thus given in 2 Black. Com. 465: "Debts by specialty are such whereby a sum of money becomes or is acknowledged to be due by an instrument *under seal.*" That this is an instrument under *seal, acknowledging a debt to be due, appears by [*209
inspection. If it be objected, that this seal might be put to it by a stranger, the side who alleges that, ought to prove it, especially, if it be that side who has possession of the paper.

Should this attempt succeed, all legal distinctions between specialties and other writings, would be confounded and destroyed, at the will of the person producing them; and the wise provisions of the law to guard debtors against being twice called upon for the same debt, would fall to the ground; especially, in the cases of assignable instruments.(*a*)

2. If this were to be considered not as a specialty, but a note, then the second question would arise, whether being attested by subscribing witnesses, those witnesses ought not to be produced, or some account given of them. Promissory notes are not usually attested by subscribing witnesses, and therefore, the ordinary mode of proving them is by witnesses to the handwriting; but if the parties will have subscribing witnesses, in what respect, and upon what grounds, can the distinction be drawn between the proof necessary in the case of notes and bonds? The rule of law as to the best evidence which the law requires, is, that no such evidence shall be admitted, which, *ex naturâ rei*, supposes still greater evidence behind, in the party's own possession or power. This rule applies equally to the withholding the best proof of the *signature of a note*, as of the sealing and delivery of a bond. If a note is not witnessed, it does not appear that any third person saw it signed, in which case, the best evidence is the handwriting of the party; but, if it be witnessed, then it appears, on the face of the note, that there is better evidence behind; and the best evidence that the nature of the case admits of, the law requires.

As no solid distinction between the case of bonds and notes can be shown, upon principle, so none appears from the authorities. Instrumental witnesses appear, by the cases, to be always called upon, and are equally necessary to prove those writings which are not under seal, as those that are; and the case in 2 Str. 1149 (*Bevis* v. *Lindsel*), which respects the proof of promissory notes before a jury of inquiry, is decisive.(*b*)

On the whole, therefore, we are of opinion, that the law is with the defendant, upon both points, and there must be a new trial, or the plaintiff may take a nonsuit, at his election.

(*a*) See Taylor *v.* Glaser, 2 S. & R. 504. In Charles *v.* Scott, 1 S. & R. 294, it was *held*, that an agreement under seal, received as *collateral security* for a simple contract debt, may be given in evidence, in *assumpsit* on the original contract, to show the amount due.[1]

(*b*) S. P. Heckert *v.* Haine, 6 Binn. 16; Wishert *v.* Downey, 15 S. & R. 77. And

[1] Where an instrument in the form of a promissory note is signed by three, and a seal is affixed to the signature of one of them, a joint action of *assumpsit* will not lie against the three. Biery *v.* Haines, 5 Whart. 563. And *assumpsit* cannot be maintained on an instrument under seal, signed by one only, but containing no agreement to bind the other. Norris *v.* Maitland, 9 Phila. 7. So, *assumpsit* will not lie on a memorandum fixing the amount due on an agreement under seal; the plaintiff must sue on the contract. Harley *v.* Perry, 18 Penn. St. 44. Where, however, a sealed instrument is executed by only one of the parties, the other may maintain *assumpsit*, on proof of performance. McGunigal *v.* Mong, 5 Penn. St. 269. And *assumpsit* lies upon a contract under seal, which has been so far modified by parol, as to amount to an abandonment of the original contract. McGrann *v.* North Lebanon Railroad Co., 29 Penn. St. 82; Lawall *v.* Rader, 24 Ibid. 283; Spangler *v.* Spangler, 24 Ibid. 454; Carrier *v.* Dilworth, 59 Ibid. 406. But unless the original contract be expressly abandoned, or so altered by parol as to make it a new contract, covenant is the only remedy for a breach. McManus *v.* Cassidy, 66 Penn. St. 260; Shaeffer *v.* Geisenberg, 47 Ibid. 500.

even if the paper be lost, the subscribing witness, if there be one, must be produced or accounted for. McMahon *v.* McGrady, 5 S. & R. 314.[1]

[1] This is the general rule. Tams *v.* Hitner, 9 Penn. St. 441; Bura *v.* Thompson, 2 Clark 143. But there are exceptions to it: thus, the admission of the maker of a promissory note that he signed it, is sufficient proof thereof, without calling a subscribing witness. Williams *v.* Floyd, 11 Penn. St. 499. So, where the action is not founded on the deed, the grantor may prove its execution, without calling the subscribing witnesses. Mix *v.* Smith, 7 Penn. St. 75; Wright *v.* Wood, 23 Ibid. 120. So also, in case of an ancient deed. Everley *v.* Stoner, 2 Yeates 122. And where a subscribing witness subsequently becomes interested, by his own voluntary act; in such case, his handwriting may be proved. Hamilton *v.* Marsden, 6 Binn. 45.

SUPREME COURT OF PENNSYLVANIA.

SEPTEMBER TERM, 1787.

POLLARD *v.* SHAFFER.

Covenant.

A covenant to repair, and to deliver up the demised premises in good order and repair, runs with the land, and binds the assignee, although he were not named by express words.

The lessee of a house covenanted, for himself and assigns, &c., to pay rent, and deliver up the premises in good repair; an action of covenant being brought by the lessor against the assignee, he pleaded that an alien enemy, viz., the British army, had invaded the city of Philadelphia, taken possession of the premises, and held the same, until the end of the term and afterwards, and that during the period they held possession, they had committed the waste and destruction, &c.: *Held*, 1. That the defendant was bound to pay rent for the whole term: 2. That he was excused, by the special matter pleaded, from the covenant to repair.

COVENANT. The plaintiff, and one Martha Green (now deceased), made a lease by indenture, dated the 1st of March 1773, of a sugar-house, &c., to John William Hoffman, and his assigns, for five years, at 70*l. per annum*, payable quarterly. The lessee covenanted for himself, his executors, administrators *and assigns*, to keep the demised premises in good repair, and to deliver them up to the plaintiff, at the end of the term, in such good repair, &c. John William Hoffman assigned the lease to the defendant, who entered into the premises. The breach alleged in this action was, that the defendant had not paid 35*l.* rent in arrear for the last half year, nor delivered up the premises at the end of the term, to wit, the 1st of March 1778, in good order and repair; but that the roof, window-shutters, floors, &c., of the sugar-house were in decay, destroyed, &c.

The defendant pleaded performance of covenants, payment, and that an alien enemy, to wit, the British army, commanded by general Sir William Howe, on the 1st of September 1777, had invaded the city of Philadelphia, had taken possession of the premises, and held the same until the end of the term, and afterwards; and that during the period they held possession, they had committed the waste and destruction, &c.

To the last plea, the plaintiff demurred generally; the defendant joined in demurrer, and issue, &c.

The demurrer was twice argued, on the 27th of June 1786, and on the 15th of April 1787, by *Coxe*, *Lewis* and *Wilson*, for the plaintiff; and *Ingersoll*, *Wilcocks* and *Sergeant*, for the defendant; and on the 6th of October, the chief justice pronounced the *judgment of the court: Mr. Justice RUSH having declined to give any opinion, as he had been of

*211]

counsel with the plaintiff in this cause, before he took his seat upon the bench.

McKean, Chief Justice.—Two questions were made in this cause: 1st. Whether the defendant, as *assignee* of the lease, is bound by the covenant to repair, as well as the lessee? And 2d. Whether the special matter pleaded, is sufficient in law to bar the plaintiff?

With respect to the first question, we are clear in our opinion, that the covenant to repair, and to deliver up the demised premises in good order and repair, runs with the land, being annexed and appurtenant to the thing demised, and shall bind the assignee as much as the lessee, even if the assignee were not named by express words, on account of the privity; but in the case at bar, the assignee is bound by *express words*, and *à fortiori*, is answerable as well as the lessee. This point has been fully settled in *Spencer's case*, 5 Co. 16 *b*; and *Grescot* v. *Green*, 1 Salk. 199; *Harper* v. *Burgh*, 2 Lev. 206; 1 Roll. Abr., tit. Covenant, *M.*, pl. 1, and *N.*, pl. 2, 6; Vin. Abr. 411, *M.*, pl. 1, 2; 1 Bac. Abr. 534, *c.* 5; and the books cited in these abridgments.(*a*)

The second question is of great difficulty, and of very great importance in its consequence. We cannot find, that it has come directly before any court in England, or in Europe. We wish, that it had come before abler judges than we pretend to be. However, we must give *our* judgment; but we do it with more diffidence than has occurred in any case since we have had the honor to sit here.

As there is no positive law, no adjudged case, nor established rule or order, to direct the court in this point, we must be guided by the principles of the law; by conscience, that infallible monitor within every judge's breast, and the original and eternal rules of justice. For equity is part of the law of Pennsylvania. 1 Chan. Ca. 141; Grounds and Rudiments of Law and Equity, 74, ca. 104; Doct. and Stud. lib. 1, cap. 16.

It is agreed, that if a house be destroyed by lightning, floods, tempests or enemies, without any concurrence of the lessee, or possibility of his preventing the same, this is no waste in the lessee; for, it is not done by the lessee's negligence, or any wilful act of his; and he cannot be charged with using it improperly, and it would thus have perished, even in the reversioner's possession. 1 Inst. 53 *b*; Brook, Waste, 69; *Herlakenden's case*, 4 Co. 63 *b*; Landlord's Law, 1st edition, p. 158, 278, 286; Fitzherbert's Natura Brevium, Waste, 132; Keilw. 87.

(*a*) The assignee of a term is bound by a covenant to pay rent, so long as he retains possession, although he did not execute the deed under which he holds. Hurst *v.* Rodney, 1 W. C. C. 375; and see Sandwith *v.* Desilver, 1 Bro. 221.[1]

[1] A covenant for the payment of ground-rent runs with the land, and binds the assignee. Roger *v.* Ake, 3 P. & W. 461; Conrad *v.* Smith, 5 W. N. C. 402; s. c., 7 Id. 160. So does a covenant to pay the principal of a ground-rent, at the end of a fixed period. Springer *v.* Phillips, 71 Penn. St. 60. And see Sandwith *v.* De Silver, 1 Bro. 221; Herbaugh *v.* Zentinger, 2 Rawle 159. So also, a building covenant in a ground-rent deed, runs with the land, and binds an alienee of the original covenantor. Fisher *v.* Lewis, 1 Clark 422. And a covenant not to underlet, runs with the land, and will be enforced in equity against an assignee of the term. Brolaskey *v.* Hood, 6 Phila. 193. So, of a covenant to renew. Barclay *v.* Steamship Co., Id. 558; Wilkinson *v.* Pettit, 47 Barb. 230; Piggot *v.* Mason, 1 Paige 412.

It is also agreed, that where the *law* creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there he shall be excused. As, in tne cases of waste against tenants in dower, by the curtesy, for life, or years, of common carriers, innkeepers, &c., of lessees by parol, &c., or of a **cesser* during a war. Aleyn 27; *Southcote's case*, 4 Co. 84 *b*; 2 Leon. 189, and other books.

*212]

But it is contended for the plaintiff, that the defendant is obliged to pay the rent, and yield up the tenements in good order and repair, because of the *express* covenant; and in support of this doctrine have been cited, Doctor and Student, Dialogue 2, chap. 4, p. 124; Aleyn 27; Stiles 47; s. c. 1 Roll. Abr. 939; s. c. Comyn 631, 632; 2 Str. 763; 1 Vent. 185; Plowd. 290; Perkins 738; Brook. tit. Covenant, pl. 4; tit. Waste, pl. 19, 31; 2 Leon. 189; Dyer 33, pl. 10; Saunders 420; 2 Vern. 280.

On the part of the defendant, it is insisted, that the express covenant in this case does not bind against acts of God or enemies, but only against all other events; because such acts were not in the contemplation of either party, at the time of the lease executed. A risk known and insured ought to be complied with, agreeable to the bargain, but not otherwise. Every contract ought to be construed according to the intention of the parties; and, in the present case, the defendant had only covenanted to keep the premises in repair, &c., against ordinary accidents, and not against a case, which he could by no possibility prevent. That if the law were otherwise, yet, in England, relief would be had in a court of chancery; and that as no such action had ever been brought, in a case circumstanced as this is, an argument is furnished, that no such action will lie. In maintenance of this opinion were cited: Ld. Raym. 909; 4 Bac. Abr. 369, 370; 1 Roll. Abr. 236; Dyer 56, pl. 15; 1 Black. Com. 252, 268; 2 Id. 379; 3 Id. 153, 157; Cowper 9, 600; Douglass 190; 1 Comyns Digest. 150; Co. Litt. 206; 1 Brown's Parl. Cases 526, 528; 15 Vin. Abr. 474, pl. 1; 3 Chan. Rep. 44, 79; 3 Burr. 1240, 1637; Dyer 33, 10; Sir T. Raymond 464; *Shelley's case*, 1 Co. 98; 6 Vin. 407, ca. 1, 3; 1 Chan. Cas. 72, 83, 84, 190.

The books have been thoroughly searched on this head, and the question discussed with great ability on both sides. In short, little more could be done or said for either party, than what has been said and done.

In deciding this intricate and difficult case, it will be of use to state the different powers of the common-law courts, and the court of chancery, in England, at the time of the revolution.

The courts of law there are governed by general and established rules, from which they never deviate in any case, be the injustice arising from them ever so apparent; for, they are bound by their oaths to observe the strict rules of law. A court of chancery judges of every case according to the peculiar circumstances attending it, and is bound not to suffer an act of injustice to prevail; and in doing this, it conforms to the spirit and intent of the general rule of every positive law, which always admits of particular exceptions, tacitly understood. The jurisdiction and bounds of these two courts are fixed.

*213]

*In this state, the judges are sworn "to do equal right and justice to all men, to the best of their judgment and abilities, according to law." There is no court of chancery. The judges here are, therefore, to determine causes according to equity, as well as the positive law; equity

being a part of the law. Doctor and Student, lib. 1, ch. 16; 1 Chan. Cases 141; Grounds of Law and Equity, 74, ca. 104. Indeed, the common law is common right, common reason, or common justice. Wood's Inst. 4.

Were this point brought before a court of common law in England, at this day, I have doubts with respect to what would be the determination. For, it is laid down as law, "that if a lessee covenanteth to leave a wood in as good plight as the wood was at the time of the lease, and afterwards the trees are overturned by tempest, he is discharged of his covenant, *quia impotentia excusat legem.*" 1 Co. 98 *b.* In that case, there was an express covenant; and although it was impossible to restore the trees in the same plight they were, yet he might plant new ones, or render damages in lieu of them. The same law in Brook, Covenant, pl. 4. Now, was it not equally impossible for the defendant to deliver the possession of the premises, in good repair, to the plaintiffs, on the 1st of March 1778, when they were held by a hostile army?

In Vaughan's reports, in the case of *Hayes* v. *Bickerstaff*, p. 122, it is held, "that a man's covenant shall not be strained so as to be unreasonable, or that it was improbable to be so intended, without necessary words to make it such; for it is unreasonable to suppose a man should covenant against the tortious acts of strangers, impossible for him to prevent, or probably to attempt preventing." This was an action brought by the lessee against the lessor, on his covenant for quiet enjoyment. In p. 119, it is said, that if the lessor covenants that the lessee shall hold and enjoy his term, without entry or interruption of any, whether such entry or interruption be lawful or tortious, there the lessor should be charged, because no other meaning can be given to his covenant. In the case before the court, if the lessee had covenanted for himself and his assigns, to deliver up the tenements in good order and repair, notwithstanding they should be destroyed by act of God or of an enemy, then this action would certainly lie, because of the special express words; but when there are no such words, but only generally to repair, &c., would it be reasonable to construe these words so as to extend to the cases put? Cannot the covenant in this case have another meaning? Can it not be so construed, that the tenements should be kept in good repair, and in such order delivered up, at the end of the term, without any act or default in him, or act of any person, who could be prosecuted as a wrongdoer, to prevent it; and notwithstanding common and ordinary accidents might happen?

Perhaps, however, the common-law courts in England might think, that they were bound by the strict rules of law, on account of the general express covenant, to determine against the defendant, and *that his relief must be in chancery, if anywhere, because of the established rules and boundaries of the jurisdiction of these courts. We must then consider the equity of this case, and determine upon all the circumstances thereof; for although we have not the chancery forms or methods of carrying several equitable cases into execution, yet we are to determine, where we may, according to equity, as making a part of the law, to prevent a failure of justice. And here we have no precedents in chancery in point, but the case of the office, which was taken away by the usurpers in the civil war in England, reported in 1 Ch. Cas. 72; that of the rent of a house, which was seised by the parliament, during the said war, for an hospital for soldiers, [*214

Ibid. 84, which appears to have been taken under advisement by the chancellor, with a declaration, that, if he could, he would relieve the tenant; but it was afterwards probably compromised, as we can find no more of it; that of the recognisance for payment of 10,000*l.* to legatees, by an executor, where the testator's estate was so lessened by the fire of London, that it became insufficient to make up the sum, Ibid. 190; and that of the fee given with an apprentice, where 120*l.* was given, and it was provided by articles *expressly*, that if the master died within a year, 60*l.* were to be returned; he died in three weeks after the execution of the articles; and though the parties themselves had provided against accidents, and though the maxim, "*modus et conventio vincunt legem*" was urged, yet an hundred guineas were decreed to be paid back. 1 Vern. 460. I say, these cases, and the uncontradicted assertion of Dunning, that the case of *Paradine* v. *Jane*, and the other cases which went upon the like principles, had been lately overruled in chancery (see 3 Burr. 1639), and also some others, which have been quoted by the defendant's counsel, hold a doctrine that is strongly in favor of the defendant.

In Doctor and Student, Dialogue 2, ch. 4, p. 126, Mr. St. German is puzzled to give a satisfactory reason to the question put by the doctor, to wit, "If a man under age marries, and lands afterwards descend to the wife, and waste is committed therein, after her death, without the concurrence or default of the husband, shall he be charged with it?" The case, thus stated, shows, that he could not refuse taking such estate, and therefore, the charge or condition annexed to it by law, is unreasonable and unjust? He makes the student answer it in this manner: "That there is as great default in him, as in him in the reversion; and that there is as great reason why he should be charged with the waste, as that he in reversion should be disherited, and have no manner of remedy, nor yet no profit of the land, as the other hath." But I conceive that as there was no default in either of them, nor remedy over for either of them, that there is more reason, that each of them should bear his own share of the loss, according to the duration of his estate, than that the one should be responsible to the other. The maxims, "*Lex non cogit impossibilia;*" "*Impotentia excusat legem;*" "Constructions are to be with equity *and moderation, to moderate the rigor of the law;" Grounds, &c., 38, ca. 49, apply to the present case.

*215]

If a lessor covenant that the lessee shall quietly enjoy against all men, yet in case he is ousted by an enemy, or tortiously entered upon by strangers, no action of covenant can be maintained against the lessor, notwithstanding the express general covenant. For the enemy he could not oppose, and against strangers, he had a remedy over. Vaughan 119, &c. This the counsel for the plaintiff agree to be the law. Why then should the law make the lessee answerable on such a general express covenant to surrender the demised premises in good repair, when they were destroyed by an hostile army? Ought not the two covenants to receive the like favorable and reasonable construction? "Remedies are to be reciprocal." "When then the construction of anything is left to the law, the law, which abhorreth injury and wrong, will never so construe it, as it shall work a wrong. Grounds, &c., 368.

To conclude: Our opinion is, that the defendant ought to pay the rent;

1st. Because of the express co enant to pay it. 2d. Because it is a sum certain, and the extent of the loss known; and as he was to have the advantage of casual profits, he ought to run the hazard of casual losses, during the term, and not lay the whole burden of them upon the lessors; as resolved in Aleyn 27. And 3d. Because if a tenant by *elegit* be interrupted to take the profits of the land, by reason of war, he shall not hold over, but shall sustain the disadvantage, as resolved in *Sir Andrew Corbitt's case*, 4 Co. 81 *b*.

But, I am of opinion, that the defendant is excused from his covenant to deliver up the premises in good repair, on the 1st of March 1778: 1st. Because a covenant to do this, against an act of God or an enemy, ought to be special and express, and so clear that no other meaning could be put upon it. 2d. Because the defendant had no consideration, no premium for this risk, and it was not in the contemplation of either party. And lastly, because equality is equity, and the loss should be divided—he who had the term will lose the temporary profits of the premises, and he who hath the reversion, will bear the loss done to the permanent buildings. Neither party has been guilty of any default; the injury has been done by a common enemy, whom both together could not possibly resist or prevent, and the premises would have been thus damnified in the possession of the plaintiff himself. Suppose, when the lease was executed, that the lessee had been asked—Is it your meaning, that, in case the buildings shall be destroyed by an act of God, or public enemies, you are to rebuild or repair them? His answer would have been, unquestionably, "No, I never entertained such an idea." Should the like question have been put to the lessor, his answer would certainly have been, "No, I do not expect anything so unreasonable."[1]

If there is no case in point, in favor of this determination, there is none against it; and since no action of this kind has hitherto *been brought, [*216 a presumption arises, that the sense of mankind is against it.(*a*) If, however, we should be thought to be mistaken, another hearing may be had before the High Court of Errors and Appeals, on a writ of error, where this new case may be finally settled.(*b*)

(*a*) See Smith *v.* Ankrim, 18 S. & R. 89; Kershaw *v.* Supplee, 1 Rawle 131, 134.

(*b*) The parties acquiescing in the decision of the court, no writ of error has been sued out.

[1] Where a person covenants unconditionally to do an act, performance is not excused, by inevitable accident, or other unforeseen contingency, not within his control. Harmony *v.* Bingham, 2 N. Y. 99. Thus, where, in a lease, there is an express and unconditional agreement to repair and keep in repair, the tenant is bound to do so, though the premises be destroyed by fire, or other accident. Hoy *v.* Holt, 91 Penn. St. 88. The court, however, concede the authority of Pollard *v.* Shaffer, p. 91. The case of Ward *v.* Vance, 93 Penn. St. 499, is an illustration of the doctrine discussed by Chief Justice M'Kean, in the text.

MUSGROVE, *qui tam*, *v.* GIBBS.

Usury.— Variance.

If a borrower give his promissory note for more than the sum loaned and legal interest, and make a partial payment, giving a new note for the balance, the offence of usury is complete; so, if he give new notes, and the old one is surrendered, though no money be actually paid.

In a *qui tam* action on the statute against usury, if the declaration set forth a contract with two partners, and the evidence be a note given by one of them alone, the variance is fatal.

THIS was an action *qui tam, &c.*, on the act of assembly against usury; and, in the course of the trial, the COURT resolved the following points:

I. Richardson, through the mediation of Shoemaker, borrowed $800 of the defendant, and gave his note for $840, payable in one month. There was no talk about premium, at the time of the loan; but it was understood by the witnesses, that the borrower was to pay at the rate of five per cent. per month for the money. At the end of the month, Richardson paid 168*l.* on account of his note, and gave a new note, drawn in favor of, and indorsed by, Shoemaker, for the balance. He discharged the amount of his last note at different times; but it was never given up by the defendant.

Resolved, that this was an illegal loaning of money, not the purchase of a note, so as to avoid the penalties of the act; and that the usury was complete on taking and receiving the 168*l.*; as a proportion of that sum went towards payment of the illegal interest included in the original note.(*a*)

II. The usurious contract was stated in several counts of the declaration, to be with Shoemaker and Shirtliffe (who were partners) jointly; but the proof was of a note given by Shoemaker alone.

Resolved, that this variance is fatal: for, an action upon the note could only be maintained against Shoemaker, who, if he intended to bind his partner, ought to have used the firm of the company; and besides, if there should be a recovery against the defendant on the present count, it would be no bar to another *qui tam* action on the same note, stating the usurious contract to have been with Shoemaker alone.(*b*)

III. Shoemaker & Shirtliffe borrowed several sums from the defendant, and gave their notes, payable in a month, with interest, at the rate of five per cent. per month, added to the principal. When these became due, they could not pay the money, but drew new notes, making the principal and interest of the former notes (which were given up by the defendant) principal, and again adding the same excessive interest upon the aggregate amount.

Resolved, that, although no money was actually paid to the defendant, the second notes were a satisfaction of the first; and the *usury was
*217] complete, on the defendant's accepting them, at thereby the original contract between the parties was extinguished. And by MCKEAN, Chief Justice.—It is well established, that the receipt of one thing in satisfaction

---

(*a*) See Philip *v.* Kirkpatrick, Addis. 124; Pawling *v.* Pawling, 4 Yeates 220; Large *v.* Passmore, 5 S. & R. 51; Evans *v.* Negley, 13 Id. 218.

(*b*) See Dunbar *v.* Jumper, 2 Yeates 74; Evert *v.* Barr, 4 Id. 99; Livingston *v.* Swanwick, 2 Dall. 300; Lautermilch *v.* Kneagy, 3 S. & R. 202; Wilson *v.* Irwin, 14 Id. 176; Craig *v.* Brown, Peters C. C. 189.

of another, is a good payment; as the acceptance of a horse in lieu of a sum of money, or of a bond by a third person, in discharge of a prior obligation.(*a*)

IV. The Court left it to the jury to determine whether, on certain facts, the defendant had loaned the money, or purchased the note in question: for, they resolved, that a fair purchase might be made of a bond or note, even at 20 or 30 per cent. discount, without incurring the dangers of usury; and if, upon the present occasion, the defendant had run the risk of a forgery, the presumption ought to operate in her favor, that, for this reason, she had bought the note at a depreciated price.(*b*)

Sergeant and *Bradford*, for the plaintiff. *Lewis*, *Ingersoll* and *Dallas*, for the defendant.

(*a*) But see Latapee *v.* Pecholier, 2 W. C. C. 180; Charles *v.* Scott, 1 S. & R. 294; Pleasants *v.* Meng, *post*, p. 380; Hamilton *v.* Galloway, *post*, 420; Wilson *v.* Hunt, Peters C. C. 441; Hart *v.* Boller, 15 S. & R. 162; Roberts *v.* Gallaher, 2 W. C. C. 191; Leas *v.* James, 10 S. & R. 307; Brown *v.* Jackson, 2 W. C. C. 24; Parker *v.* United States, Peters C. C. 262; Kean *v.* Dufresne, 3 S. & R. 233; Wolf *v.* Wyeth, 11 Id. 149.

(*b*) In Wycoff *v.* Loughead, 2 Dall. 92, it was ruled "That a man may *bonâ fide* purchase any security for the payment of money, at the lowest rate he can, without incurring the penalties of usury." See the remarks of Judge Yeates, in Ritchie *v.* Summers, 3 Yeates 541, as to the right of the vendee to recur to the vendor, in the event of forgery.[1]

[1] The case of Ritchie *v.* Summers was reversed by the High Court of Errors and Appeals, whose opinion will be found in a note to 30 Penn. St. 147.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

SEPTEMBER TERM, 1787.

DOANE'S Administrators *v.* PENHALLOW *et al.*

Jurisdiction.—Prize.

Where a vessel had been captured by an American privateer, during the revolution, and condemned as prize, in the admiralty court of New Hampshire, and on appeal to the Federal court of Appeals, ordered to be restored, it was held, that an action could not be maintained, in a court of common law, to recover the value of the vessel.[1]

THIS was a foreign attachment, in which, and in two others against the same defendants, for the same cause, a motion was made to quash the writs. After argument, the President recapitulated the grounds of the motion and delivered the opinion of the court as follows :—

SHIPPEN, President.—On the hearing of this motion, the plaintiffs were called upon to show their cause of action : they show that on the 17th of September 1783, a certain cause, wherein Elisha Doane was claimant and appellant, against the brigantine Susannah and her cargo, and John Penhallow and others, libellants and appellees, was tried in the court of appeals in cases of capture, established by congress, in the city of Philadelphia. And that it was there finally adjudged and decreed by the said court of appeals, that the sentence or decree, given by the inferior and superior courts of judicature in the state of New Hampshire, in the said cause, should be revoked and annulled, and the property specified in the said claim, should be restored to the claimant. The plaintiffs further show, by depositions, that notwithstanding this final decree of reversal, the defendants, although requested, had refused, and still refuse, to restore the property specified in the claim of the said Elisha Doane (the said defendants being owners and agents of the privateer McClary which captured the said brigantine Susannah and her cargo), but had converted and disposed of the same to their own use. Upon this ground, the action is brought, to recover the value of
*219] *the said brig and cargo, against the defendants. Two other actions are brought by Isaiah Doane and James Shepherd against the same defendants, for the same cause.

The motion to dissolve these attachments is founded on a rule and prac-

---

[1] See the case of Penhallow v. Doane's Administrators, in the supreme court of the United States, 3 Dall. 54.

tice of this court, that in cases of foreign attachment, they will examine into the plaintiff's cause of action, and if they find it not to be such as would entitle him to hold the defendants to special bail, they will dissolve the attachment. This rule was founded on the mischiefs which were found to arise from groundless attachments of the ships and property of persons not inhabitants or resident within this state, and is conformable to the spirit of the attachment law.

The counsel for the defendants, in order to show that there are not sufficient grounds to hold the defendants to bail, have produced evidence of an original condemnation of the brig and her cargo as lawful prize, in the maritime court of New Hampshire, on the 16th day of December 1777, agreeable to an act of assembly of that state; and also a similar condemnation in the superior court of judicature of that state, on an appeal from that maritime court, with an order for sale and distribution of the property among the captors, and an actual sale and distribution accordingly. And they urge, that the subsequent reversal of those sentences, five or six years afterwards, by the commissioners of congress appointed for hearing appeals in cases of prize, is null and void, and insufficient to revest the property in the claimants, congress having had no power, before the articles of confederation, to receive appeals in case of prize. They also urge, that a prior action has been brought by the present plaintiffs against the defendants, in the state of Massachusetts, for the same cause; and that on the trial of that action, the judges there determined, that the decree of reversal should not be given in evidence to the jury; and that the plaintiffs, in order to avoid a verdict against them, had prayed and obtained leave to discontinue that action. And that, therefore, the present action is vexatious, and the defendants should not be held to bail.

A third reason is also urged by the defendants' counsel, that this being originally a cause prize, it is exclusively of admiralty jurisdiction; and that no action will lie at common law, either for the original taking, or any of the consequences.

The court have heard, and deliberately considered, the several arguments on these points, delivered by learned counsel on both sides.

The first point involves in it the sovereign rights of the separate states on the one hand, and the supreme power of the United States in congress assembled, on the other; and is, indeed, a momentous question; which, however, we shall show in the decision of the third point, to be unnecessary, and perhaps, improper for us to decide upon.

On the second point, it is proper to declare, that we think ourselves indispensably bound to give full faith and credit to the legal acts of our sister states; and that the judgments given in their *courts will have their [*220 full effect here. But it is not every discontinuance that will disable a plaintiff to hold a defendant to bail in a second action;(a) *that* will depend upon the circumstances of vexation attending the case; which we, likewise, think it unnecessary to discuss, in the present case, as we are clear and unanimous on the last point.

The whole learning upon this subject is collected together and drawn to a

---

(a) See Clark v. Weldo, 4 Yeates 206; Field v. Colerick, 3 Id. 56; Parasset v. Gautier, 2 Dall. 330.

point, in the famous case of *Le Caux* v. *Eden*, reported in Douglas 572. By this case, and the cases cited by the judges in support of their opinion, it appears clearly: 1st. That the question of prize or no prize, is solely and exclusively of admiralty jurisdiction, and not triable at common law. 2d. That not only the original taking, but all the consequences are solely appropriated to the admiralty. 3d. That although there may have been a definitive sentence of acquittal in the admiralty, and that sentence conclusive on the question, yet for any matter happening consequential to the taking as prize, no suit will lie at common law; and that in all those consequential cases, notwithstanding the sentence of acquittal, the question of prize or on prize must still arise, and the sentence is evidence of a thing which the common law cannot inquire into.

The application of these cases to the cause before us is evident and obvious. The original taking of the Susannah, and her cargo was by a commissioned privateer, as prize; the carrying her into port, the procuring her condemnation in the maritime court of New Hampshire, and the sale and distribution by order of that court, were all consequences of this taking as prize. And notwithstanding the sentence of reversal and acquittal, the question of prize or no prize will still occur.

The answer given by the plaintiff's counsel to the cases cited in Douglas, is, that in all those cases, the facts on which the actions were founded, happened previous to the decision of the question of prize; but that in these actions, the facts which support them occurred after the final sentence of acquittal, when the cause was at rest, and it was no longer necessary to examine the question of prize; which facts were, that after the final sentence of reversal, the defendants were requested and refused to restore the property agreeable to the sentence, and converted it to their own use, which is the gronnd of the action. The distinction itself does not appear, from the cases, to be well founded, as it is not the time when the facts happened, but the connection they have with the original capture, and their being the necessary consequences of the capture, that gives the exclusive jurisdiction to the admiralty. In the case of *Radley* v. *Egglesfield*, in 2 Lev. 25, there had been a previous condemnation of the ship and goods as prize, in Scotland, and two subsequent sales on land, one in Scotland and the other in England: under which last sale, one of the parties claimed; yet the court say, that this does not alter the case, being matters consequential upon the original taking,
*221] *and dependent upon it. And it is observable, that in this very case, as it is reported in 2 Saund. 259, the court say that the validity of the sentence in the admiralty court in Scotland was determinable by the law of the admiralty of England, and not by the common law. If, however, the distinction made by the plaintiff's counsel was even admitted to be well founded, do the facts on which these actions must be supported, appear to be subsequent to the final acquittal? It is true, there was a demand and refusal, subsequent to that decree, but a demand and refusal is only evidence of a conversion, and not the conversion itself. Are we to shut our eyes against the other evidence, and not see when the conversion was made? It appears to have originated on the taking the vessel as prize on the high seas, and it was completed, on the sale and distribution of the money, in pursuance of the decree of the superior court of New Hampshire, in consequence of the taking as prize—all this, long before the reversal of the decree.

What is this, then, but an action to enforce by our authority the decree of the court of appeals? Are we authorized to enforce that decree? Is there any case whatever, which shows that an action will lie at common law, to carry into execution the decree of a prize court of admiralty? The jurisdictions of the two courts are entirely separate, and they judge by different laws. It is true, that in some cases, the courts of common law and the instance court of admiralty have concurrent jurisdiction, as in suits for seamen's wages; but in no case whatever, have the prize courts of admiralty and the common-law courts a concurrent jurisdiction.

I have said before, that the question of prize would still occur in this action; the ultimate fact disputed is, whether the vessel and cargo were prize or not; the evidence to support or contradict this fact arises, on one side, from the sentences of the maritime courts of New Hampshire; on the other, from the sentence of the court of appeals of congress. The validity of the latter sentence is disputed; if we say it is valid, we, in effect, say she is no prize, if otherwise, we say she was a prize. We have clearly no authority to say either one or the other. By the case in Saunders, we cannot determine upon the validity of the sentence itself; and if we could, yet it is, as Justice Buller observes in Douglas, evidence of a thing which a common law court has no right to inquire into.

Upon the whole, therefore, as the question to be tried in this action, if not directly a question of prize, is yet a question arising upon the immediate and necessary consequences of the vessel's being taken as prize, which is solely and exclusively of admiralty jurisdiction; and as it is an action to carry into execution the sentence of the court of appeals, which we have no authority to do (that being the proper judicature to carry into effect its own sentences), we think, the present action will not lie, and adjudge that the attachments be dissolved.(*a*)

---

*Eastwick *v.* Hugg. [*222

Damages.

A new trial was granted in an action *for money had and received*, where the court had left it to the jury to give such damages as they thought just, and the verdict was for a greater amount than the defendant had received.[1]

This was an action for money had and received, &c. The defendant, being sheriff of Gloucester county, in New Jersey, received a sum of money for the plaintiff, which he lent, with her consent, upon a mortgage of lands in that state. The mortgagor, from time to time, paid the interest to Hugg,

---

(*a*) In a case decided previously to the revolution (Taxier *v.* Sweet, 2 Dall. 81), it was held, that the court had jurisdiction of an action to recover the value of a vessel taken as prize by the defendant, and ordered to be restored by the commissioners of appeals in prize causes. But see Henderson *v.* Clarkson, 2 Dall. 174; Cheriot *v.* Foussat, 3 Binn. 220; Bingham *v.* Cabot, 3 Dall. 19. The case of Penhallow *v.* Doane, in the supreme court of the United States, 3 Dall. 54, settled the contested question of the jurisdiction of the federal courts of appeal.

[1] S. P. Hill *v.* Philadelphia, 2 Phila. 351; Hunt *v.* Bruner, 6 Id. 204; Nunan *v.* Bourquin, 7 Id. 239.

and finally, in the year 1778, paid the whole principal and interest to him in depreciated paper money. It did not appear that Hugg had any express authority from the plaintiff to receive this payment of the principal from the mortgagor, and she afterwards refused to accept the continental money, insisting that she was entitled to recover the full sum in specie; for which, accordingly, the present action was brought. Upon the trial of the cause, the court, in their charge, left it to the jury, to give such damages as they thought just; whereupon, a verdict was returned for the plaintiff, for the full amount received by the defendant (27*l.* 10*s.*), in hard money; and *Lewis*, upon the ground of misdirection, moved for a new trial.

In support of this motion, two points were made for the defendant: 1st. That in an action for money had and received, the plaintiff waives all tort, admits the right to receive, and therefore, can recover no more than has actually come to the defendant's hands. 2 Burr. 1008; Cowp. 416, 419; Ibid. 199; Bull. N. P. 128. 2d. That the defendant, in this case, held the money as trustee for the plaintiff, and ought, therefore, to be discharged from any payment, except in the identical paper money which he had received. 2 Penn. Laws, 496.

Sergeant, for the plaintiff, urged, that the court would not grant a new trial, where the object was so inconsiderable; nor merely for a mistake in the form of the action, if the justice of the cause was with the plaintiff. 2 Burr. 936; Cowp. 601; 2 Burr. 604-5. And he insisted, that the jury had a right to estimate the damages. 10 Mod. 19; 1 Ld. Raym. 1000.

The President, after consideration, stated the circumstances of the case, and delivered the opinion of the court, in the following manner:

Shippen, President.—The facts were shortly these: The defendant, then sheriff of Gloucester county, in New Jersey, having in his hands a sum of money belonging to the plaintiff, who resided in the city of Philadelphia, in the year 1772, with the consent of the plaintiff, lent it to one of his neighbors in New Jersey, at seven per cent. interest. A bond and mortgage was taken for it, in the name of the plaintiff, which were left in the defendant's hands, for the purpose of receiving the money when it should become due, for the *use of the plaintiff. The obligor, whose name was White, paid interest, at different times, to the defendant, who paid it over to the plaintiff. In the month of November 1778, the defendant received the whole principal and interest then due, in continental money, and delivered up the bond and mortgage to the debtor. It appeared by the testimony of White, that when he paid the money to Hugg, he did not mean to make a legal tender of it, although he brought a witness to be present at the payment, which was done, as he said, only because he himself did not well understand the English language. Hugg not having paid the money to the plaintiff, she brings this action against him for money had and received to her use.

*223]

On the part of the plaintiff, it was contended on the trial, that the defendant not having been compelled to receive the continental money, received it in his own wrong, and ought to answer the full sum in hard money, to the plaintiff.

On the part of the defendant, it was urged, that the defendant being authorized to receive the money, had received it properly, in the then cur-

rent money, made a legal tender by law, and could be answerable for no more than he had actually received.

The court left it to the jury to consider the justice and equity of the case, but hinted their opinion, that, considering the circumstances of the times, it might be most reasonable and just to settle the sum according to the scale of depreciation. At the same time, telling them that this action was in the nature of a bill in equity, and that they might give such a sum in damages as they thought just. The jury found a verdict for the plaintiff for the sum received, in hard money. A motion was then made for a new trial, on the ground of misdirection.

Having had time to deliberate and consider the law arising on this case, we are of opinion, that the court ought not to have left it to the jury to give in damages more than was actually received.

The action of *assumpsit* for money had and received, has been of late considered to be of so liberal a nature, that it is not to be wondered at, that, on a sudden, its extent should be mistaken. It is a very beneficial action, not only for the plaintiff, but the defendant; yet, it has its limits. It is beneficial to the plaintiff, because, when he has another remedy as well as this, he may elect this, and is under no necessity to state the special circumstances of his case, but may make it out by evidence on the trial. For the defendant, it is beneficial, because, as Lord Mansfield says, he can be liable no further than for the money he has received, and against that may go into every equitable defence, upon the general issue. It is, in fact, an action to oblige the defendant to refund what he has received; and the word refund, *ex vi termini*, precludes the idea of his being answerable for more than he has actually received. Interest, indeed, may be added as damages for the detention, but no more. In this kind of action, the plaintiff waives all torts and special damages; *and goes only for the money received; and so far confirms the defendant's act, as that he cannot gainsay his right to receive it. [*224

As to the justice of the verdict, it is not so very apparent, as to make us anxious to support it, against the rules of law. Col. Hugg was the plaintiff's agent in this matter, without any reward. He was an officer in the American army, and probably thought the support of the war depended on the support of the credit of the continental money; it was the only money then in circulation; and though it had depreciated five or six for one, he might reasonably think it would not only be injurious to his own reputation, but to the common cause, to refuse it. All these circumstances must have been known to the plaintiff, and yet she suffers the bond and mortgage to remain in his hands. She might have taken the securities from him, and abided by the consequences of refusing it herself. The debtor, White, it is true, swore he did not mean to force the money upon Hugg; but it is as true, that when he brought the continental money to discharge the debt, he brought a witness with him, which he had not done before, when he paid the interest in hard money. This circumstance might reasonably induce a belief in Hugg, that he meant to make a legal tender of the money; and White, notwithstanding what he says, might possibly have availed himself of it as a legal tender, in case Hugg had refused the money.

For these reasons, I say, the justice of the verdict may be well questioned; yet, if the case had been before the jury in such a way as that they

could legally have given damages according to their discretion, perhaps, we should not have thought it proper to set aside their verdict, on account of their having, in a doubtful case, exercised their judgment, and drawn different conclusions from the facts. However, as the law is clear, that in this kind of action, the defendant is liable for no more than he has received, we must order a new trial.(*a*)

---

*225] *KUHN *v.* TRIMER.

Set-off.

The assignee of a bond, given by an insolvent, who obtained his discharge, after it became due, cannot use it as a set-off against the price of goods purchased from the obligor.[1]

THE plaintiff had become bound to one Splecit in the payment of a certain sum of money; and after the bond was due, he obtained a discharge under the insolvent laws. Subsequently to his discharge, the defendant bought sundry goods of him, and when the price was demanded, tendered Splecit's bond in payment, an assignment of which he had purchased for that purpose. The plaintiff, refusing to accept it, brought this action, and on the trial, the defendant offered to give the bond in evidence, by way of set-off; in consequence of which, the balance would have been turned in his favor.

Sergeant, for the plaintiff, opposed the admission of the bond in evidence, and cited Bull. N. P. 179.

Levy, contended, that the evidence ought to be allowed, and referred to the same book, page 170.

BY THE COURT.—The hardship that must attend the admission of the bond, would, in reason, be alone sufficient to determine us to reject it. An insolvent debtor could never get forward in the world, if his old bonds, and other negotiable papers, were thus capable of being put in force against him. A debt of 50*l.* might be bought for 50*s.* and the debtor, after his discharge, be liable, by such negotiations, to be defeated in every action, and baffled in every contract.

(*a*) On the second trial of this cause, the 14th of May 1788, *Levy* called the defendant as a witness, to prove that the continental bills of credit, which he produced in court, were the identical bills he received from White, in satisfaction of the mortgage. But *Sergeant* objected, that Hugg was not an agent, within the meaning of the act of assembly, but merely a person who had officiously received the moneys of another.

THE COURT rejected the witness. And SHIPPEN, President, observed, that Hugg appeared to have been an agent to receive the interest; but it was evident, that he doubted in his own mind, whether his authority extended any further; for, it is in proof, that when he was tendered the principal, he referred the mortgagor to the plaintiff herself, who resided in Pennsylvania. There must be some satisfactory proof of his being actually an agent, before the court can allow a party to be sworn, under the act of assembly, to identify the money in dispute.

By the verdict of the second jury, it appears, that they reduced the money according to the scale of depreciation, and added the interest.

[1] Reversed by the supreme court, on error, *post*, p. 452.

But the law is clear, that the assignment being *after* the insolvency, the defendant can be in no better condition than the assignor, who could only come in for a dividend.

The evidence was overruled, and *Levy* tendered a bill of exceptions.

Hocker *v.* Stricker, under-sheriff.

Replevin.

In replevin, the sheriff ought to allow the defendant a reasonable time to find security, before a removal of the goods; otherwise, it seems, he cannot justify under his writ.

It was ruled, in this case, that before the goods are removed, the sheriff ought to allow a reasonable time, for the defendant in *replevin* to find security, on a claim of property; which, in the practice of Pennsylvania, supplies the place of a writ *de proprietate probanda:* and Shippen, President, said, that if the jury were of opinion, that a reasonable time had been refused, the defendant, Stricker, could not, in an action of trespass, justify under the writ of *replevin.*(*a*)

---

*Busby *v.* Busby. [*226

Devise.—Life-estate..

A testator began his will as follows, "As to what worldly estate I am blessed with, I dispose of as followeth:" He gave to his son A., a house, &c., to hold to him, his heirs and assigns for ever, and then bequeathed to his wife B., "a certain piece of land, bounding, &c.;" and also one-third of his movable estate, "which shall be in lieu of her dower or thirds of my estate;" the residue of the *personal* estate was disposed of: *Held*, that B. took only an estate for life.

This was a case stated for the opinion of the court. It was argued, on the 11th instant, by *Sergeant*, on the one side; and *Lewis* and *Levy*, on the other. This day the President repeated the case, and delivered the opinion of the court as follows:

Shippen, President.—The question arises upon the will of Thomas Busby, whether the devise to his wife of a certain piece of land therein mentioned, passes a fee simple, or an estate for life only. There are no words of limitation in the devise; but, it is contended, that in the introductory part of the will, and by the whole will taken together, it was the clear intention of the testater to pass a fee. The intention of the testator is said to be the pole star to guide the construction of wills. But there are two qualifications to this rule: 1st. That this intention must not clash with the rules of law; and 2d. That where legal technical terms are wanting, the intention, to supply them, must be clear and manifest from the words and expressions in the will.

The will begins with these words; "And as to what worldly estate I am blessed with, I dispose of as followeth." There are three devises which relate to the real estate: *first*, a devise to his son Isaac Busby of the house and plantation where the testator then dwelt, with all the appurtenances there-

---

(*a*) See Weaver *v.* Lawrence, *ante*, p. 156, and the notes to that case.

unto belonging, to have and to hold unto the said Isaac Busby, his heirs and assigns for ever, he paying his brother ten pounds a year, during his natural life." The *second* devise is to his wife, of the land now in dispute, in these words: "I give, devise and bequeath, unto my wife Mary, a certain piece of land bounding on William Busby, &c. Also I give my said wife one-third of such movable estate as shall be remaining after the payment of my debts and funeral expenses, and such legacies as are herein after given, which shall be in lieu of her dower or thirds of my estate." He then gives several pecuniary legacies to his seven children, and bequeaths the remain-two-thirds of his personal estate to his son Isaac and his five sisters, equally to be divided between them. And the *third* and his last disposition of his land is a direction, that his house and land by the mill should be sold by his executor.

The word "estate" in a will, connected with a devise, as where a man gives all the residue of his estate, or gives his *estate* in such a place, will pass a fee-simple, without words of inheritance; because it shall be intended, that he meant to give the whole estate which he himself had, both as to quantity and quality. The words, "as to all my worldly estate," in the beginning of the will, unconnected with any particular devise, show an intention to dispose of his whole estate, but will not carry an estate that is clearly omitted; but if it be dubious whether it be omitted or not, it will help the interpretation. There are many cases in the law-books of wills beginning with these words. I shall content myself with animadverting *227] *upon only two of them, cited one on one side of the question, and the other on the other side, as they appear to me to be the most similar to the present case as to this point.

The first is the case of *Frogmorton* v. *Holiday*, in 1 W. Black. 535, and 3 Burr. 1618 The will in that case began, as here, "as to all her worldly affairs and estate;" it is similar to it likewise, in disposing of the residue of her personal estate, and not mentioning the realty, and also in containing a devise of another estate *with* words of inheritance. But there is an ingredient in that case, on which the greatest stress appears to have been laid by the judges; which was, that, in the devise, the trustee charged the house and garden with the payment of fifty pounds out of the yearly rents and profits; the annual rent was ten pounds a year; the devisee was about seven years old, at the death of his mother, and there was a direction that if the devisee should die in his minority, then the house and garden should go to the testatrix's three daughters share and share alike. Here, though the charge on the profits, unconnected with other circumstances, would not have passed a fee, yet the court said this was a middle case, and that the reason why this mode of payment was ordered, was apparently, because the devisee was a minor, and the limitation over, if he should die before the age of twenty-one, showed the testator meant the heir should not have it; for, if the devisee was barely to take an estate for life, the time of his death must be immaterial to the devise over; but limiting it over, only upon the contingency of his dying in his minority, showed that the testator intended to give him an absolute estate in fee, which he might dispose of, when he came of age. The implication was, therefore, thought by the court to be a necessary one, and the other parts of the will assisted the construction.

The case cited on the other side as most material, is the case of *Frogmorton* v. *Wright*, in 2 W. Black. 889. There, the will began, as here, "as to all my temporal estate ;" there were no words of inheritance in the particular devise, and there was a disposition of the residue of the personal estate only. There, the court said, though the probable intent of the testator was an absolute disposition, yet it is not a certain intent, nor is it a legal disposition. In the report of the same case, in 3 Wils. 414, the whole will is set out, and it appears that there were two devises of lands to his different nephews, nearly in the same words, and several pecuniary bequests to his other nephews and nieces. The Chief Justice there says, it may seem probable that the testator's intention was that his nephew William should have a fee ; but it is a clear rule of law, that there must be express words, or a necessary implication, to disinherit the heir-at-law, and where neither of them appear, the legal operation of the words of the will must govern. In the case first mentioned, in 1 W. Black., the court say, there was a necessary implication, and, therefore, they determined it a fee ; in the latter case, there was no necessary implication, therefore, they determined it only an estate for life.

*The implications contended for, on the part of the plaintiff, in this [*228 case do not appear to me to be *necessary* implications ; they amount at most to *probable* ones ; but we are not warranted in departing from the rules of law, by probable conjectures. And it may be questioned, whether even these probabilities are not overbalanced by the presumptions arising from the devise of his house and plantation to his son Isaac Busby, in which he carefully and formally inserts an *habendum* to him, his heirs and assigns for ever : and also by his adding to the devise of the land in controversy, that it should be in lieu of her dower or thirds of his estate ; it being well known in the country, that such dower or thirds of land is only during life.

We are, therefore, of opinion, that Mary Busby took only an estate for life by the devise.(*a*)

Judgment for the defendant.

(*a*) See Caldwell *v.* Ferguson, 1 Yeates, 250, 380; Doughty *v.* Brown, 4 Id. 179; French *v.* M'Ilhenny, 2 Binn. 19; Burkhart *v.* Bucher, Id. 86; Morrison *v.* Semple, 6 Id. 94; Cassell *v.* Cooke, 8 S. & R. 268; Campbell *v.* Carson, 12 Id. 54; Steele *v.* Thompson, 14 Id. 84.

SUPREME COURT OF PENNSYLVANIA.

JANUARY TERM, 1788.

MILLER *v.* HALL.

Insolvency.

Where a debt had been contracted in Maryland, of which state the defendant was a resident, but the plaintiff was a citizen of Pennsylvania, it was held, that a discharge under the general insolvent law of Maryland, entitled the defendant to an *exoneretur*, in Pennsylvania.

RULE to show cause why an *exoneretur* should not be entered on the bail-piece. The defendant had obtained his discharge under the insolvent law in the state of Maryland, which law was enacted subsequently to the debt in question, and to the institution of this suit. It was stated and allowed, that the money for which the action was brought, had been paid to Hall in Maryland, on account of goods sold and delivered upon a commission as the partner of Miller; but that the original agreement under which they acted in the sale of those goods, was executed in Philadelphia, and that the proceeds belonged to merchants residing in Pennsylvania, where, consequently, the payment was to be made. It was, likewise, admitted, that the defendant was resident in, and subject to the laws of Maryland; and that the plaintiff was resident in, and subject to the laws of Pennsylvania; and it did not appear to the court, that the plaintiff was returned as a creditor in the defendant's schedule; nor was any notice of the time and place of surrender served upon him, though a general publication of the defendant's intention to take the benefit of the insolvent law, was made, in the usual form, in the Baltimore Gazette.

Moylan, in showing cause against the rule, argued, that according to the strict idea of a municipal law, it was limited in its operation to the jurisdiction of the state that made it; for *jus civile est quod quisque sibi populus constituit;* and to a free people particularly, it must appear, unreasonable that there should be legislation where there is no representation. 2 Inst. 98. There are, however, he acknowledged, cases in which an indirect effect is given to foreign statutes,* in order to accomplish the rules of justice; as in the instance of contracts entered into in other countries, or of bargains which are unlawful where made; or of a certificate obtained under a bankrupt law in a foreign nation, of which both debtor and creditor are members and subjects. Prin. of Eq. 363; 1 W. Black. 234, 256. But still, in all these exceptions, the foreign statutes, as such, have no coercive

*230]

authority *extra territorium*, but are received only by consent, so far as they are necessary to justice.

He then contended, from the facts, that the defendant did not come within the principle of any of the cases referred to; for, as the plaintiff was not a subject of Maryland, it cannot be presumed, that either by himself or his representatives, he has consented to the defendant's discharge, or rather to the law by which that discharge was authorized; that, as between the plaintiff and defendant, the place of the contract, which the law materially regards, was Philadelphia, where the merchants to whom the money was, in fact, payable, resided; and that even if the contract had been made in Maryland, the defendant would not be in a better condition on that account, as the law under which he was discharged, was enacted several years afterwards, and therefore, could not have been in the contemplation of the parties in making their agreement.

He urged, likewise, the inconveniences that would attend the adverse doctrine, from a variety of considerations. Suppose, there had been no bankrupt law in Pennsylvania, and that, in truth, our legislature disapproved of it, yet, every debtor, by going into Maryland and complying with the terms of their general act, or, perhaps, by virtue of a special one, might obtain a certificate, which it is contended, would discharge him from his creditors here; and thus another state would make laws for us, not only without our consent, but contrary to our interior policy. Again, if no other notice is required than an advertisement in a Maryland newspaper, which the citizens of Pennsylvania seldom read, the spoils may be shared among the creditors present, to the exclusion of the absent; who, at the same time, have been guilty of no fault or negligence, but, if they had been apprised of the transaction, might have suggested such circumstances of fraud, as would prevent the granting the very certificate, which is set up as conclusive bar to their just demands. In England, the king is not bound by the bankrupt laws (1 Atk. 303), and shall we be bound, who are not in any degree connected with the government that made them? If Maryland had given a preference to her own citizens in the distribution of an insolvent's, or a bankrupt's estate, ought we, who are strangers, to be affected by the certificate of discharge, though we derive no benefit from the surrender of property? Where, or how, is the line to be drawn? If, indeed, the certificate is to be universally operative, so ought the assignment of the bankrupt's estate to be, since the words of the bankrupt laws are, in this respect, as comprehensive and forcible, as in that; and yet it is an established doctrine, that the assignment is only binding in the state in which the commission issues. Doug. 160. The act of [*231 *Maryland is an insolvent, and not a bankrupt law, and it works no extinguishment of the debt, but leaves all future acquisitions of property liable to the creditors of the person discharged: and in the case of *James et al.* v. *Allen*, *ante*, p. 188, SHIPPEN, President, determined, that an insolvent law of New Jersey was local in its terms, and local in its nature.

Ingersoll, in support of the rule, having stated that an *exoneretur* might be entered, without an actual surrender of the principal: Barn. 194; 1 Com. Dig. 496; and proved that the defendant had complied with the terms of the insolvent law of Maryland, observed, that imprisonment had been thought, by very judicious writers, to be an act illegal in itself (Burges on Insolv.); and

it seems, indeed, that the only reasonable justification of it, is to compel a debtor to surrender all his effects for the benefit of his creditors. When that is done, it is not only unreasonable and unjust, but by the express provision of the Const. of Penn. § 8, independent of the doctrines founded on the common law, it is illegal to restrain a man's personal freedom.

He then contended, that from general principles, from positive authorities, arising under the bankrupt laws of different countries, from the reason of the thing, and from the mischievous consequences of a contrary position, the discharge of the defendant in one state, ought to be sufficient to discharge him in every state; without this, perpetual imprisonment must be the lot of every man who fails; and all hope of retrieving his losses by honest and industrious pursuits, will be cut off from the unfortunate bankrupt.

But a debt paid according to the law of a foreign country, though in a depreciated medium, has been decreed to be a satisfaction: and a *cessio bonorum*, in Holland, which is a discharge there, was decided to have the same effect in England. Co. Bank. Law, 60–2, 115, 347; Green Bank Law, 131, 260; 2 Str. 738; 1 Atk. 113; Brown Cases in Chan. 376. These authorities apply here, with additional force, under the the sanction of the articles of confederation, which declare, that "full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." And also, that the free inhabitants of each of these states shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state." See Art. 4.

The Chief Justice, after consideration, delivered the opinion of the court.

McKean, Chief Justice.—This case comes before the court on a motion for leave to enter an *exoneretur* on the bail-piece, upon this principle, that the defendant has been discharged under an insolvent law of the state of Maryland, which is in the nature of a general bankrupt law. To this it has been objected, that the insolvent law by which the defendant has been discharged, was made pending the action, and therefore, ought not to operate in the present case, even *if the laws of any particular country could be ex- *232] tended beyond the jurisdiction of that country, which has likewise been denied; and it is said, that in order to give a binding force to laws, it is necessary that the person to be affected should have consented to them, either by himself or his representatives.

But having considered the principles of the law of nations, and the reciprocal obligation of the states under the articles of confederation, we are of opinion, that the act of assembly by which the defendant has been discharged, must be considered as a general bankrupt law, made for general purposes, and equally advantageous to all his creditors. To execute, therefore, upon his person, out of the state in which he has been discharged, would be giving a superiority to some creditors, and affording them a double satisfaction—to wit, a proportionable dividend of his property there, and the imprisonment of his person here. It is true, that the laws of a particular country, have in themselves no extra-territorial force, no coercive operation; but by the consent of nations, they acquire an influence and obligation, and

in many instances, become conclusive throughout the world. Acts of pardon, marriage and divorce, made in one country, are received and binding in all countries. In the state of Delaware, there is a law, a narrow and contracted one, indeed, which obliges executors or administrators to discharge the debts, due from the deceased to his creditors within the state, in preference to every other. This the executor is obliged to comply with, because he is immediately under the coercion of the law which prescribes it; so that the distinction thus made, is certainly binding out of the state, and the law is in that respect everywhere received; for, it would be more unjust to compel the executor, who acted legally in his own state, to pay the money out of his pocket, than that the creditor should lose the amount of his demand.

With respect to the argument, that no person can be bound by laws to which he has not either directly or virtually consented, it must be observed, that, though Mr. Miller, the plaintiff, was not a citizen of Maryland, yet Mr. Hall was; and he, by the law in question, has been obliged to transfer all his effects for the benefit of all his creditors. Having done this, we must presume, that he has fairly done it, and therefore, to permit the taking his person here, would be to attempt to compel him to perform an impossibility, that is, to pay a debt, after he has been deprived of every means of payment —an attempt which would, at least, amount to perpetual imprisonment, unless the benevolence of his friends should interfere to discharge the plaintiff's account.

From the nature of the act, then, it appears to be founded upon equitable grounds, for general and just purposes; it ought, therefore, to be regarded in all other countries, and should enjoy that weight, in our decisions, which it naturally derives from general convenience, expediency, justice and humanity. For, mutual convenience, policy, the consent of nations, and the general principles of justice, *form a code which pervades all nations, [*233 and must be everywhere acknowledged and pursued.

Upon the whole, it is clear, that this transaction does not arise *in fraudem legis*, and that extending the law of Maryland to its present object, will be in no degree derogatory to the independance and sovereignty of this state: Therefore, let the *exoneretur* be entered.(*a*)

Respublica *v.* Gordon.

Attainder.

A suggestion of attainder dismissed by the court, on the ground, that it would contravene the treaty of peace with Great Britain.

The defendant was included in an act of proclamation issued during the late war, and not appearing within the time prescribed, was attainted of treason, for adhering to the king of Great Britain, in consequence of which, his estate was confiscated to the use of the commonwealth, but it had never been taken into possession.

He returned, since the peace, to the state of Pennsylvania, and applied

---

(*a*) See the note to James *v.* Allen, *ante*, p. 188; and see the remarks upon this case in Mr. Ingraham's Treatise on the Insolvent Laws, p. 185, 2d ed.

to the executive council, representing that he was a minor at the time of the attainder, and was forcibly prevented by his guardian from joining the American army—for which reasons he prayed a restoration of his estate. The council said, they were ready to grant him a pardon, but that they had it not in their power to restore his estate, which was a matter of legislative jurisdiction. Mr. Gordon, therefore, addressed several members of the general assembly, but he was there answered, that the executive council, or the supreme court of justice, was the proper tribunal to hear and determine the merits of his case. The defendant, by the advice of his counsel, again applied to the executive power, and requested, that, to bring the matter before the judges, the attorney-general might be directed to file a suggestion in the supreme court, of the defendant's being attainted in the manner above mentioned.

This being done accordingly, Mr. Gordon gave bail for his appearance, and two pleas, 1st, infancy, and 2d, duress, were filed, to the suggestion thus made, on the behalf of the commonwealth; to the former of these, the attorney-general demurred, and joined issue on the latter.

But now, the CHIEF JUSTICE delivered the opinion of the court, that any proceedings against Mr. Gordon, the defendant, would contravene an express article in the treaty of peace and amity, entered into between the United States of America and Great Britain, for which reason, they could not sustain the suggestion filed by the attorney-general. And the defendant was accordingly discharged.(*a*)

---

*234] * STEINMETZ *et al v.* CURREY.

New trial.

New trial granted, where the verdict was against the weight of the evidence.
Notice of the protest of a bill must be given in a reasonable time.

MOTION for a new trial. The circumstances of the case were these: James Whitelaw drew a bill of exchange, dated the 30th of October 1775, for 239*l.* 18*s.* 0*d.* sterling, upon William Houston & Co. in Refrew, near Glasgow, payable on the 1st of August 1776, in favor of John Witherspoon or order; which bill was afterwards indorsed by the said John Witherspoon, by Archibald Currey (the defendant), by Archibald and Wm. Blair, by John Pringle, by Steinmetz & Bell (the plaintiffs), by Mark Freeman, and by William Cowpland. The defendant's indorsement was made on or about the 17th of April 1777, and the bill was presented and protested for non-acceptance, on the 30th of December 1778; of which notice was given on the 28th of April 1780, to the plaintiffs, who, on the 9th of November following,

---

(*a*) The object that the defendant meant to accomplish by this proceeding, was to reverse the attainder; in consequence of which his title to the estate would revive, and as it had not been appropriated or disposed of by the commonwealth, there would then be no obstacle to his taking immediate possession. The legislature soon afterwards passed an act in favor of Mr. Gordon's pretensions See 1 Dall. 1; Ibid. 199; Ibid. 305, in note.

paid the amount, and giving notice thereof to the defendant, on the 17th of October 1782, they commenced the present action, on the succeeding day.

Upon the trial, the court was moved to direct the jury to find a special verdict; but, perceiving so great a complication of fact and law in the case, and being doubtful, as the whole transaction happened *flagrante bello*, whether the point of reasonable notice of the protest, was proper for them, or the jury, to determine, it was thought best, upon the whole, to leave it to the jury to find either a special, or a general verdict, as they should think advisable. The jury found a general verdict for the plaintiff.

The motion for a new trial was made, and argued, at the last term; and now, the Chief Justice, having recapitulated the preceding state of the case, delivered the opinion of the court.

McKean, Chief Justice.—The motion for a new trial in this cause, has been supported on two grounds: 1st. Because the plaintiffs declare on the first bill of exchange, and produce the second and third, with a protest of the second; alleging, that the first was also protested, but furnishing no proof of that fact. And 2d. Because the verdict was against law and evidence.

Granting new trials depends on the legal discretion of the court, guided by the nature and circumstances of the particular case. 1 Burr. 293. The courts of England have granted them, where the jury have found a general verdict, after counsel have prayed for, and the court have directed, a special one. 8 Mod. 220; 1 Willes 212. So, where the verdict is against the strength of the evidence, and the trial is peremptory. 12 Mod. 439; 1 Barn. Notes 322; 1 Str. 584; 2 Ld. Raym. 1358; s. c. 1 Burr. 395. And where the matter appears to the court to deserve a re-examination, they have likewise frequently ordered a new trial. 12 Mod. 336, 347; Vin. Abr. Trial, N. g. f. 475.(*a*)

In the present case, the verdict appears to be against the strength of the evidence. Two years and a half (from the 28th of April 1780, *until the 17th of October 1782) elapsed, between the time at which the plaintiffs had notice of the protest of the bill in question, and the time when they gave notice to the defendant. And as the former resided at Philadelphia, and the latter at Poughkeepsie, in the state of New York, the distance of these places, which is less than 150 miles, does not sufficiently account for so extraordinary a delay, even though it happened during a war. [*235

It is well understood, that notice of a protest ought to be given in a reasonable time; and by not giving it, the indorser takes the loss upon himself: 1 Salk. 127; 2 W. Black. 469; Cun. Law of B. of Ex. 40, § 6; Doug. 497; 1 Term Rep. 168; 5 Burr 2671. And want of notice is tantamount to payment. 1 Term Rep. 408, 712.

Upon the whole, we think this cause requires a re-examination; that the verdict was against the strength of the evidence given on the trial, and the law respecting reasonable notice; and that the defendant, who has no remedy over, but against John Witherspoon, the prior indorser, or James Whitelaw, the drawer of the bill, will be improperly exposed to a great loss

(*a*) Cowperthwait *v.* Jones, 2 Dall, 56; Jordan *v.* Meredith, 3 Yeates 318; Commonwealth *v.* Eberle, 3 S. & R. 9.

by the neglect of the plaintiffs, if those persons should, in the meantime, have become insolvent.

A new trial awarded.(*a*)

(*a*) This case was retried at the April term following, when the court declared their opinion, unanimously, that the delay had been unreasonable; in consequence of which, the plaintiff suffered a nonsuit. See the case reported, *post*, p. 270. The rule, that notice must be given in a reasonable time, is settled by numerous decisions in this state, from the case in the text down to Gurley *v.* Gettysburg Bank, 7 S. & R. 324. As to what notice must be given, and when it may be dispensed with, see Mallory *v.* Kirwan, 2 Dall. 193; Fisher *v.* Evans, 5 Binn. 542; Barton *v.* Baker, 1 S. & R. 334; Smith *v.* Bank of Washington, 5 Id. 322; Richter *v.* Selin, 8 Id. 438; Levy *v.* Peters, 9 Id. 125; Gibbs *v.* Cannon, 9 Id. 198; Juniata Bank *v.* Hale, 16 Id. 157; Gallaher *v.* Roberts, 2 W. C. C. 191; Read *v.* Wilkinson, Id. 514; McMurtie *v.* Jones, 3 Id. 206; Denniston *v.* Imbrie, Id. 396. See also the note to Robertson *v.* Vogle, *post*, p. 252.

COURT OF OYER AND TERMINER,

AT PHILADELPHIA.

FEBRUARY SESSIONS, 1788.

RESPUBLICA *v.* SHAFFER.

Grand jury.

Witnesses cannot be examined on the part of the defendant, by a grand jury.

AFTER some conversation with the Grand Inquest, the Attorney-General informed the court, that a list of eleven persons had been presented to him by the foreman, with a request, that they might be qualified and sent to the jury, as witnesses upon a bill then depending before them. He stated, that the list had been made out by the defendant's bail; that the persons named were intended to furnish testimony in favor of the party charged, upon facts with which the inquest, of their own knowledge, were unacquainted; and he concluded with requesting, that the opinion of the court might be given upon this application. The Chief Justice, accordingly, addressed the grand jury to the following effect:

MCKEAN, Chief Justice.—Were the proposed examination of witnesses, on the part of the defendant, to be allowed, the long-established rules of law and justice would be at an end. It is a matter well known, and well understood, that by the laws of our country, every question which affects a man's life, reputation or property, must be tried by *twelve* of his peers; and that their unanimous verdict is, alone, competent to determine the fact in issue. If, then, you undertake to inquire, not only upon what foundation the charge is made, but, likewise, upon what foundation it is denied, you will, in effect, usurp the jurisdiction of the petit jury, you will supersede the legal authority of the court, in judging of the competency and admissibility of witnesses, and having thus undertaken to try the question, that question may be determined by a bare majority, or by a much greater number of your body, than the twelve peers prescribed by the law of the land. This point has, I believe, excited some doubts upon former occasions; but those doubts have never *arisen in the mind of any lawyer, and they may easily be removed by a proper consideration of the subject. For the [*237 bills or presentments, found by a grand jury, amount to nothing more than an official accusation, in order to put the party accused upon his trial; until

the bill is returned, there is, therefore, no charge from which he can be required to exculpate himself; and we know that many persons, against whom bills were returned, have been afterwards acquitted by a verdict of their country. Here, then, is the just line of discrimination: it is the duty of the grand jury to inquire into the nature and probable grounds of the charge; but it is the exclusive province of the petit jury, to hear and determine, with the assistance, and under the direction of the court, upon points of law, whether the defendant is, or is not guilty, on the whole evidence, for, as well as against him. You will, therefore, readily perceive, that if you examine the witnesses on both sides, you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must, consequently, be tantamount to a verdict of acquittal or condemnation. But this would involve us in another difficulty; for by the law, it is declared, that no man shall be twice put in jeopardy for the same offence: and, yet, it is certain, that the inquiry now proposed by the grand jury, would necessarily introduce the oppression of a double trial. Nor it it merely upon maxims of law, but, I think, likewise, upon principles of humanity, that this innovation should be opposed. Considering the bill as an accusation grounded entirely upon the testimony in support of the prosecution, the petit jury receive no bias from the sanction which the indorsement of the grand jury has conferred upon it. But on the other hand, would it not, in some degree, prejudice the most upright mind against the defendant, that on a full hearing of his defence, another tribunal had pronounced it insufficient?—which would then be the natural inference from every *true bill*. Upon the whole, the court is of opinion, that it would be improper and illegal to examine the witnesses, on behalf of the defendant, while the charge against him lies before the grand jury.

One of the grand inquest then observed to the court, that "there was a clause in the qualification of the jurors, upon which he, and some of his brethren, wished to hear the interpretation of the judges, to wit, what is the legal acceptation of the words "*diligently inquire?*" To this, the CHIEF JUSTICE replied, that "the expression meant, diligently to inquire into the circumstances of the charge, the credibility of the witnesses who support it, and from the whole, to judge whether the person accused ought to be put upon his trial. For (he added), though it would be improper to determine the merits of the cause, it is incumbent upon the grand jury to satisfy their minds, by a diligent inquiry, that there is a probable ground for the accusation, before they give it their authority, and call upon the defendant to make a public defence."

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

MARCH TERM, 1788.

POULTNEY *et al. v.* ROSS.

Evidence.—Account-book.

The shop-book of a tradesman is evidence to charge the *original debtor* only; it is not admissible against a defendant, who merely assumed to pay the debt of the person, to whom the goods were sold.

AN appeal being entered from the judgment of Isaac Howell, Esquire, one of the justices of the city of Philadelphia, &c.; on the trial of the cause, it appeared, that the defendant went to the store of the plaintiffs, and bought some articles, for which he afterwards paid; that, at the same time, he carried with him, one Hawke, a joiner, who complained that he was frequently distressed in his trade, for want of a small credit; whereupon, the defendant told the plaintiffs, that he did not think they would suffer by trusting him for two or three dollars, as he was an industrious and honest man, and that he (the defendant) would see the money paid; that the plaintiffs accordingly delivered to Hawke sundry articles at different times proper for his trade, as a carpenter and joiner, amounting to 5*l.* and upwards; that at the distance of nine months, having inquired after Hawke, and found he had eloped, they sent an account for those articles to the defendant, who was charged in their shop-book (which Poultney, one of the plaintiffs, proved to be their book of original entries) as the absolute purchaser; and that, before the justice from whose judgment the appeal was made, the defendant, though he insisted that *all* the articles were not for his use, acknowledged the receipt of some of them.

Upon these facts, the question arose, whether the entry in the plaintiffs' shop-book, attested by one of them, upon solemn affirmation, was sufficient, in this case, to charge the defendant? And the President delivered the following charge to the jury.

*SHIPPEN, President.—As the law that has prevailed upon this subject, is adapted to the peculiar situation of the country, it will naturally differ from the law which is established in other places, under different circumstances. Thus, though in England, the shop-book of a trades- [*239

man is not evidence of a debt, without the assistant oath of the clerk who made the entry; yet here, from the necessity of the case, as business is often carried on by the principal, and many of our tradesmen do not keep clerks, the book, proved by the oath of the plaintiff himself, has always been admitted. The practice in this respect, however, has been confined to charge the original debtor, to whom the goods were sold; for, the necessity of the case only required, that the plaintiff's oath should be allowed to prove the actual delivery; and it would be highly dangerous, if the evidence were extended to establish the assumption of a third person to pay the debt.

It is the duty of the jury, therefore, to consider, whether the defendant, on the present occasion, is the original debtor, or merely a person assuming to pay the debt of another. If, indeed, it appears, that he has sent a servant, or tradesman, for these goods, on his own account, he is clearly liable; for, when they come to his use, *that* makes him the original debtor. But if I go to a shop with a joiner, and say to the master, "I will see you paid for the articles with which you trust this man;" here, though I am liable, upon proof of this undertaking, yet it is not in the character of the original debtor, for the joiner who received the goods is the original debtor; but it is on account of, what the law terms, my collateral promise; which cannot be proved by the testimony of the party interested, but may by a note in writing, or by some indifferent witness to the transaction.

In the case before us, the evidence of the justice (Mr. Howell), is not certain as to the circumstances; for the goods were delivered in small parcels, from time to time; they were such as suited the joiner's business; and even, from the plaintiff's own account, they were applied to his use, though the defendant was considered to be liable for the payment. Whether these facts, therefore, and the defendant's previous purchase at the plaintiffs' store, will account for the acknowledgment of having received a part, the jury must determine. But if they are of opinion, that the defendant has only assumed to pay the debt of another person, the plaintiffs cannot be witnesses in the cause, and, consequently, there is no proof of the assumption. On the contrary, if they think the defendant is the original debtor, the plaintiffs are witnesses to prove the entry in their book, and they are entitled to recover the amount of their demand.

Verdict for the defendant.(*a*)

(*a*) In Sterrett *v.* Bull, 1 Binn. 237; C. J. Tilghman said, "In consideration of the mode of doing business in the infancy of the country, when many people kept their own books, it has been permitted, from the necessity of the case, to offer these books in evidence. But when no such necessity exists, when the fact is, that clerks have been employed, and the entries made by them, there is no cause for violating that wise principle, that no man shall be allowed to give testimony for himself." It was accordingly held in that case, that where the entries were made by a clerk, he must be produced, or proof made that he is dead, or out of the power of the court. In a more recent case (Thompson *v.* McKelvey, 13 S. & R. 127), the same learned judge, in reference to the admissibility of papers purporting to be a book of original entries kept by the plaintiff himself, remarked, "This kind of evidence was admitted in the early stages of the settlement of Pennsylvania, from necessity. Business was small, and people could not afford to keep clerks. But in the present state of society, a strict hand is to be kept over it. We must not extend it beyond its ancient limits." In Mifflin *v.* Bingham, *post*, 272; C. J. McKean seemed to think, that the books of a defendant were evidence to determine a

Brown *v.* Sutter.

Opening default.

Shippen, President, said, in this case, that the court would never open a regular judgment, to let in a plea of the statute of limitations.(*a*)

---

*Newman *v.* Bradley. [*240

Evidence.— Witness.

When evidence is given of a confession by a defendant, all that he said must be taken together, unless there are circumstances, which render improbable what he said.

An attorney may be a witness for his client, although his judgment-fee depends on his success in the cause.

In this case, *Howell*, who was of counsel with the plaintiff, proved that the defendant, on a citation to show cause of action, &c., acknowledged that he borrowed the money in question, from the plaintiff, but declared, at the same time, that he had repaid it. This was the chief evidence to support the action; and *Howell* and *Tod* contended, that the acknowledgment was, of itself, sufficient to charge the defendant, but that what he said in avoidance of the plaintiff's demand, ought to be proved. Gilb. Law of Ev. 51.

Levy, on the contrary, urged, that the confession must be taken in the whole, as well that part which acquits the defendant from the debt, as that which tends to charge him with it. Trials per Pais, 363. He allowed, however, that there were some cases, where the confession might properly be believed against the party who makes it, though rejected in those points which operate in his favor. Upon an indictment of larceny, for instance, if the defendant says he had the stolen goods in his possession, but alleges that he bought them, the jury will give credit to the former, but disregard the latter part of his confession. The improbability of the circumstance

---

collateral question, as that a third person was the defendant's debtor at a certain period; but the authority of the case in the text, has, it is believed, never been shaken. Under what circumstances shop-books will be admitted to charge a party to the suit, see Ducoign *v.* Schreppel, 1 Yeates 347; Vance *v.* Fairis, 2 Dall. 217; 1 Yeates 321; Ogden *v.* Miller, 1 Bro. 147; Wilmer *v.* Israel, Id. 257; Wright *v.* Sharp, Id. 344; Curren *v.* Crawford, 4 S. & R. 5; Rogers *v.* Old, 5 Id. 404; Ingraham *v.* Bockius, 9 Id. 285; Smith *v.* Lane, 12 Id. 80; Summers *v.* McKim, 12 Id. 405; Thompson *v.* McKelvey, 13 Id. 126; and Kaughley *v.* Brewer, 16 Id. 133. It has been held, that the plaintiff was not competent to prove the handwriting of a person who made the entries in his book, and who had subsequently died. Karsper *v.* Smith, 1 Bro. app'x liii.

(*a*) In Dutilh *v.* Miller, 2 Bro. 311; Judge Hemphill remarked, that the authority of Brown *v.* Sutter remained undisturbed by any decision in the state, with which they were acquainted. The court, however, in that case, determined, that if the defendant (against whom judgment had been entered for want of an appearance) would swear that the money was actually paid, or in any way settled or accounted for, they would not restrict him from pleading the statute of limitations; but upon a general affidavit of defence merely, they would not open the judgment, to give him the opportunity of pleading the statute.[1]

[1] See Ekel *v.* Snevily, 3 W. & S. 273, where Chief Justice Gibson says, this case would not now be held for law, as a rule of practice.

alleged in excuse or exoneration, is the criterion to judge from; and in the case cited from Gilb. Law of Ev. 51, the improbability that so large a sum should be given as a reward out of so small an estate, was perhaps the ground of decision. But in the present case, the object (about 10*l.*) was trifling in itself, and no circumstance of improbability attended the defendant's relation of the fact.

SHIPPEN, President.—This is the very case put in the books, and the rule which is founded upon it, extends generally to all civil suits. When a confession is given in evidence, all that was said must be stated, and the whole, generally speaking, ought to be taken together, unless such circumstances of improbability appear, as will render it necessary for the defendant to prove what he asserts in avoidance of a conceded fact.(*a*) It is true, there are some occasions when a jury will charge a man with what he acknowledges against himself, and yet refuse to credit him for what he advances in his own favor. As, if he should admit, that he purchased the goods, which the plaintiff alleges were sold to him, but insists that he paid for them at a particular time and place, in the presence of certain persons; and those persons, on being examined, declare that they were present at the time and place mentioned, but that they did not see the defendant make any payment to the plaintiff: here, undoubtedly, the rule ought not to operate.

In the present case also, the jury will not be influenced by the defendant's saying he repaid the money, if they do not think it credible, or if anything can be gathered from the evidence, to show that it was not paid, when he says it was.

*241] *Verdict for the plaintiff: owing, I believe, to some slight testimony, that seemed to repel the idea of the defendant's having repaid the money.

When *Howell* offered himself as a witness, *Levy* objected that he was interested, inasmuch as his judgment-fee depended on his success in the cause. But the objection was overruled by the court.(*b*)

JACKSON *et al.*, Executors, *v.* VANHORN.

Opening default.

Judgment opened, where defendant, by mistake of the attorney, had notice of trial on a wrong day.

JUDGMENT had been entered by *non sum informatus*, in this cause, as the defendant did not appear on the day of trial. But *Sergeant* now moved

---

(*a*) S. P. Farrel *v.* McClea, *post*, p. 392. In Blight *v.* Ashley, Peters C. C. 20, Judge WASHINGTON said, "The whole of an entire conversation may be given in evidence, to explain the meaning of the parties; the testimony cannot be garbled. But what a party has said at one time, which makes against him, cannot be explained by declarations made at another time, which, possibly, were made to get rid of the effect of former declarations.

(*b*) It has been held, that an attorney or counsel, is competent to give evidence for his client, although he expects to receive a larger fee, if his client recover. Miles *v.* O'Hara, 1 S. & R. 32.

to open the judgment, upon an affidavit that the defendant had notice of the trial for the 17th, instead of the 13th, and that there was a just and conscionable defence.

Lewis, for the plaintiff, said, that he did not mean to contest the matter, but he wished it to be settled, whether the mistake of an attorney was, in such cases, sufficient to set aside a judgment.

By the Court.—On a mistake of this kind, evidently appearing, we cannot refuse the motion.

Penman *et al. v.* Wayne.

Arrest of freeholder.

Under the act of 1724–5, the court has a right to inquire into the circumstances of the arrest of a freeholder under a *capias*, and to relieve him, if they think he was *intended* by the act to be exempted, although the plaintiff may have made an affidavit, previous to issuing the writ, that the defendant had not been *resident* in the state for two years.

A rule had been obtained to show cause why the *capias*, which issued in this case, should not be quashed, the defendant being a freeholder in the county of Chester. It appeared, that, with the *præcipe* for the writ an affirmation of one Rumford Davis was filed in the prothonotary's office, setting forth, that "the defendant had not been *resident* in this state for two years before the date of the writ;" and it was contended, that this was sufficient, under the act of assembly, to repel the defendant's claim of privilege. (1 Sm. Laws, 164).

The question, therefore, was, whether the court could, notwithstanding the affirmation filed *before* the writ issued, inquire into the matter of residence, in order to determine, on all the circumstances of the case, whether the defendant was within the exceptions of the act? It was twice argued, on the 21st and 33d of May, by *Sergeant*, for the plaintiff, and *Lewis*, for the defendant; and the substance of both arguments was as follows.

For the *plaintiff*.—The act of assembly rests the proof exclusively on the affidavit of the party, or some person for him; requiring only that he should make the fact, which defeats a freeholder's privilege from arrest, appear to the justice who grants the writ. Nor will the section admit of the division for which the adverse counsel contend; because, though there is a clause providing that things shall not be proved by affidavit, which, in their nature establish a higher degree of proof; as judgments, mortgages, [*242 &c., yet, *even subsequent to that clause, it is said, as the deponent believes; an expression which manifestly relates to the first part of the section, and necessarily connects the whole. If, indeed, the court were to investigate the facts, both parties are entitled to a hearing, and a new and preliminary scene of litigation would be opened, involved in endless difficulties. The legislature, therefore, wisely made the filing the affidavit *before* the writ issued, the conclusive test for holding the defendant to bail; and from the circumstances under which the law was passed, we are authorized to assert, that without these easy exceptions, the privilege itself would never have been granted.

But, if the doctrine which the opposite side advance is allowed, the 2d and 3d sections of the act would contradict each other, instead of holding that clear and fair meaning, which, taken according to their distinct objects, they naturally present. For, should any one, contrary to the spirit of the 1st section, issue a *capias* against a freeholder, then the 3d section provides a remedy, by directing the court to stay all proceedings against the defendant, until they examine his circumstances, and if they find he is such as the act intended to be exempted, they are required to abate the writ. But this is in the case of an arrest in the first instance, and not of a *capias* founded upon an affidavit previously filed, according to the terms of the 2d section; which terms make a condition precedent, and, being complied with, the most wealthy freeholder is subject to an arrest; nor can the court afterwards interfere to relieve him.

For the *defendant*.—The act of assembly upon this subject is clearly divided into two parts; *first*, it treats of those cases which depend implicitly on the affidavit of the party, stating the facts uncomplicated with law; and *secondly*, it treats of those cases which depend on their respective circumstances, when brought into question before the court. The present case does not come within the first class, but is fairly within the second; for, having enumerated all the exceptions which may be proved by the oath of the party, or some person for him, the act goes on to state the exceptions which are to be made appear from records or otherwise; and the very last of these, is the instance on which the controversy arises.

The defendant's objection being thus warranted by the letter of the law, will be supported likewise by the principle and reason of the thing. For, would it not be absurd, to leave it to an illiterate, though honest man, to determine what constitutes a legal residence? or, to suffer an unprincipled, though cautious plaintiff, to take advantage of a short absence, to justify his swearing, that the defendant had not been resident within the state, for two years before the arrest? If the court cannot at all develop the circumstances, it will make no difference in the case, whether the absence is for a year, or a day; on a party of pleasure, or a journey of business; the privilege of the most substantial freeholder must lie for ever at the mercy of his antagonist; and even a continental officer dispatched upon the duties of his
*243] profession to another state, will be equally liable *to this constructive abridgment of the rights of citizenship. A stronger illustration of this truth cannot be required, than the cause before the court; for the defendant has, within the very two years, specified in the affirmation, represented this commonwealth in the general assembly, in the state convention, and in congress; and yet, it is contended, that the vague idea of an unlettered individual on the point of residence, shall be sufficient to deprive him of the privilege of his freehold, and, in effect, to declare him an alien.

There is, however, an essential difference between residence, and abiding in a particular place. It is admitted, that the defendant did not abide within the state for two years before the arrest; but we contend that, nevertheless, in contemplation of law, his residence was here; for a man is always presumed to reside where his family is; and though when he goes abroad upon any temporary avocation, he abides in that district to which he goes, yet this does not destroy his original domestic residence. By one act

of assembly, it is provided, that foreign attachments shall only issue against such as are not resident within the state (1 Sm. Laws, 45) ; and by another act (1 Sm. Laws, 181), it is declared, that no person who has not resided within the state, two years before his imprisonment, shall have the benefit of the insolvent laws : in these cases, and in the construction of the poor laws, and, in short, of all the statutes in which the word occurs, it has been the invariable practice of the courts, to inquire into the facts, upon which the residence is either asserted or denied ; and on that inquiry, to pronounce the law. Thus, on the petition of one *McIntire*, for the benefit of the insolvent law, although he had been absent more than two years and a half ; yet, as it was in proof, that he was a native, and always intended to return hither, this court lately determined, that his residence became a matter of law, and that the *animus revertendi* was sufficient to prevent his losing the advantages of it.(*a*)

What then is the proper interpretation of the act upon this subject? That the party shall set forth in his affidavit such facts, as will enable the court to draw the legal inference, with respect to the defendant's residence ; which, after all, is a technical term (5 Burr. 2724), and the maxim is well established, that a witness may swear to matter of fact, but not to matter of law. This rule, indeed (which applies in all cases of evidence), satisfactorily explains why a disjunctive is introduced in the section under consideration ; why the provision in the former part of the clause, that the justice who grants the writ shall administer the oath, is omitted in the latter ; and why the words, the plaintiff, or some other person for him, are dropped, when the section comes to treat of those things which are matter of law ; for the expression, as the deponent believes, at the same time that it precedes the sentence respecting the defendant's residence, evidently relates to the value of the estate, and not the mode of proving the incumbrances that affect it. But surely the legislature could not mean to make a man the judge both of fact and *law in his own cause, and that without appeal. Holt asserts that an act of parliament which should authorize so unreasonable a thing, would be void ; and it is fortunate, on this occasion, that a candid review of the law itself does not countenance this absurdity, which lies only in the plaintiff's construction. The first clause defines the persons privileged ; the second narrows down the privilege by a variety of exceptions ; these exceptions are either in fact or law ; and the exceptions in law are such as must either be determined by the records themselves, or by the court, upon a statement of the facts on which they arise. If, therefore, it had been intended to leave the matter of residence entirely to the affidavit of the party, the division of the section by the word *or*, would have been postponed, and this sentence must then have been classed before those things which are to be proved from records or otherwise. Nor is the word *otherwise* to be considered as merely distinguishing the proofs by record, from those by affidavit ; but as meaning such other evidence as the common law requires : for, surely, it would be as improper, nay, more dangerous, to permit a man to swear as to the residence of his adversary, than as to the existence of a mort-

[*244

(*a*) Mr. Ingraham, in his Treatise on the Insolvent Laws, page 13, says, that the record has been searched for this case, without success. See the cases Ex parte Evans, Cooper and Nones, stated in pages 11 and 12 of that treatise.

gage or judgment, which he might easily ascertain, by inspecting the dockets and records in which they are entered.

But, let us suppose, that there was no disjunctive in the section, and inquire for a moment, whether the court, even on that ground, have not a right to investigate the facts contained in the affirmation? By the last sentence of the second section, all the affidavits, taken in pursuance of the act, are directed to be filed: now, this cannot be intended merely to show that an affidavit has been made, for that would sufficiently appear from the entry in the docket; but as another more beneficial purpose, results from this practice, the court will think themselves bound to support that purpose, as the real object of the legislature; and will determine, accordingly, that the filing of the affidavits is intended to give the judges an opportunity of seeing, on any future controversy, whether the allegations bring the case legally within the exceptions of the act. In the instance of *residence*, above all others, as few plaintiffs comprehend the technical import of the word, this provision seems to be indispensable; and when the third section says, that if the court find the defendant is such as by the act is intended to be exempted from arrest, it furnishes a conclusive argument, that they must examine the evidence produced by the parties; for, in order to find a particular object, it is clearly requisite, in the first place, to search for it.

These ideas on the subject are, likewise, corroborated by the uniform practice of the courts; which has been to issue the *capias* at once, leaving the proof of the exception, until the defendant makes his claim of privilege. The defendant in the present case would be under no difficulty to obtain bail; but the principal ground of his opposition is, that if he now tacitly suffers himself to be arrested, his privilege, by the words of the act, will be for ever extinguished.

*245] *For the *plaintiff*, in reply.—Though the best freeholder may be arrested, after notice to enter special bail, yet, as this is a compulsory process, it will not destroy his privilege in another action. To do that, there must be a willing submission to an arrest, by which the defendant holds out to the world that he is not within the privilege of the act.

Residence is certainly a construction of the law, in a great variety of instances. *Nutbrown's case*, in Foster 76, shows that a man may have several places of residence, and any of them may be the subject of a burglary. So, by the poor laws, a man may live in a particular place all his life, except one day, and yet not acquire a legal residence; for, he may be under a certificate, or he may not have complied with the conditions of the statutes: and in the case of ambassadors, although they actually reside abroad, their children are deemed natural born subjects of the realm. 5 Burr. 2724, is grounded on the words of the act of parliament. But the act of assembly in discussion, clearly meant a literal and not a technical and constructive residence, or it would not have been made the subject of an affidavit, which is to be sworn by persons not generally possessed of technical information.

The decisions under the attachment law, establish a distinction between inhabitants and residents; as in the case of *Lazarus Barnet* (ante, p. 152), where the foreign attachments were quashed, because he came under the

former description. With respect to decisions under the insolvent laws, whether the petitioner has resided in the state two years, or not, is a matter immediately before the court; but in the present case, it is a fact to be sworn to, in order to entitle the plaintiff to a certain advantage. The whole law is connected, indeed, by the idea of an affidavit; and there are many instances where an incumbrance to diminish the value of the defendant's estate may be proved, without producing the mortgage or record. For example, at any time before the acts for recording deeds and mortgages, or, within six months, since those acts, respectively, evidence might be given of a mortgage in the hands of a third person; or a scrivener might prove that he had witnessed the execution of a conveyance from the defendant.

The reason for filing the affidavit is, that it may appear to the court what it contains; for, swearing to anything does not entitle the plaintiff to bail. If, however, it is made in conformity to the act, it is conclusive; then (as Lord Mansfield somewhere expresses himself), he is sworn, and you have no remedy but to prosecute him. The act says, in all such cases, that is, where the regular affidavit is made, a *capias* shall issue. This is included in the very clause where judgments are mentioned; so that, in strictness, the exception founded on judgments ought, likewise, to be accompanied with an affidavit. Nor is this making a man the judge in his own cause; for he only swears to the words in their literal and customary meaning and import.

*The law declares that if any freeholder, exempted from arrest by virtue of this act, shall happen to be taken by a writ of arrest, the court shall abate the writ. But, if an affidavit has been filed agreeable to the 2d section, no man can be a freeholder exempted by the act from arrest; and, consequently, the *capias*, in this case, shall be maintained. The act was evidently the result of a compromise between contending parties; one side obtained a general clause exempting freeholders from arrest; and the other side guarded against this privilege by a *proviso*, which, in fact, puts it in the power of any person to compel a freeholder to give bail. But if the court can inquire into the facts, in all cases, this provision is a mere snare; for should the weight of affidavits be eventually against the plaintiff, he will not only lose his action, but be condemned in treble costs. [*246

Upon the *first* argument, SHIPPEN, President, observed, that there was considerable ambiguity in the act of assembly; and that he was not satisfied with respect to the meaning of the expression "where the plaintiff can make appear from records, or otherwise," as it was not specified to whom the exception should be made appear. He said, that in several cases (one of which he remembered was on Mr. *Levy's* motion), it had been determined, that the second section of the act was disjoined; and that no affidavit was necessary to support the exception founded upon a judgment, which was the legal test of its own existence, and no other evidence would be received to prove it. He added, at the same time, that the words, *as the deponent believes*, clearly related to the defendant's not having a sufficient estate left to satisfy the plaintiff's demand; that it is not necessary to set forth the facts in the affidavit, under this act, as it is in England, where a positive affidavit is required to hold the defendant to bail; that if, indeed, the whole of the second

section were connected, it would amount to a condition precedent, and a positive affidavit would preclude the court from any inquiry into the facts; but, he continued, that the section was not only disjoined by the words of the act (in the first place admitting proofs by affidavit or affirmation, and in the second place, requiring proofs from records or otherwise), but also by the reason and propriety of the case, which will not permit a plaintiff, in his own favor, to determine what constitutes a legal residence.

Smith, the prothonotary, being asked as to the practice, said, that in some cases, the affidavits were filed before, but, more frequently, after the issuing of the writ. If the suggestion was, that the defendant intended to go abroad, the affidavit had always been filed, in the first instance; but with respect to the case of residence, he did not recollect any instance, before the present, where that was done.

The President now delivered the opinion of the court:

Shippen, President.—We have found some difficulty in obtaining a satisfactory idea of the meaning of the second section of this act. It would
*247] seem, by the former part, that the exception upon *which the *capias* is grounded, ought to be made appear to the justice who grants the writ; but, in the latter part, when the disjunction of the clause occurs, the expression is general, if the plaintiff can make appear from records or otherwise, without saying to whom he shall make his allegation appear. At first, indeed, I thought, this might also relate to the justice who grants the writ; but on a further consideration of the subject, I am convinced, that unless the legislature intended something more, it would never have been provided by the third section, that the court shall stay all proceedings against the defendant, until they examine his circumstances; for, it would have been useless and nugatory to direct that examination, if they were, nevertheless, bound by the contents of the affidavit.

Besides, upon the principles of common justice, it is material, that the court should have the power of making an inquiry into the facts; for, though the plaintiff's opinion is taken, in the first instance, to ascertain whether there is a sufficient estate left for the payment of his demand; yet it would be unreasonable, to deprive the defendant of his privilege, if he could afterwards show, that, independent of a trifling mortgage or judgment, an ample security was left for his adversary's debt. Nor is the equity of the case less applicable upon the question of residence; for, an occasional absence of a month, or a week, might with safety be made the foundation of the affidavit required by the act; and, yet, who will say, that, in law or reason, this ought to work a disfranchisement of the defendant?

The law is explicit, that if the court find the defendant is such as by the act is intended to be exempted, the writ shall be abated; and this, surely, also implies something beyond a mere inquiry, whether an affidavit has been previously filed. If he is such "as by the act is *intended* to be exempted," is a sentence materially to be regarded in the clause; for, otherwise, it would have been sufficient to say, that if no affidavit is filed, nor any mortgage or judgment is produced, the defendant shall be discharged from the action.

It is evident, upon the whole, that the legislature did not mean to subject a citizen of large estate to the process of a *capias*, on account of a short

absence from the state; and therefore, we are of opinion, that they have left a controlling power in the court to inquire into the circumstances of the case, and to relieve a defendant from an arrest, if we think he was intended to be exempted, although the words, that he has not been resident, may be inserted in the plaintiff's affidavit.

The defendant was, accordingly, allowed to controvert the fact, of his not being resident in the state for two years before the writ issued.(*a*)

---

*James *et al.* *v.* Young. [*248

Affidavit.

An affidavit, to open a judgment, may be made by a third person, when the defendant is disabled by sickness.

Judgment being entered by default, at the first term, *Mifflin* had obtained a rule to show cause why it should not be opened, upon the affidavit of a *third* person, that the defendant was bed-ridden, and that there was a just and conscionable defence.

Todd afterwards opposed the motion, as grounded upon the affidavit of a *third* person. But—

By the Court.—A third person, fully acquainted with the circumstances, ought certainly to be admitted to make the affidavit of a defence, when the party himself, from extreme sickness, is incapable of making it; but when he is present, and subject to no disability, it is regularly incumbent upon him to do it. This, however, is a case under very particular circumstances; and the judgment was entered at the first term. We think, therefore, the judgment ought to stand as a security; but that the defendant must be let into a trial, upon an issuable plea.[1]

Cooper *v.* Coates.

Depreciation.

Under the act of 1781, auditors were appointed, only where there was a *dispute* about depreciation.

On a rule to show cause why auditors should not be appointed, under the act of assembly,[2] the defendant's deposition was read, wherein he swore that no question of depreciation could arise in this cause.

(*a*) This case came before the court again, in the following September term, when the defendant having produced evidence to establish his residence, the rule to show cause why the writ should not be quashed, was made absolute. See the case, *post*, p. 348, Where, however, the plaintiff has made an affidavit that he had demanded security of the defendants, before issuing the writ, counter-evidence will not be admitted. Filler *v.* Harman, 2 Yeates 280; See also, Barnard *v.* Field, *post*, p. 348; Fitler *v.* La Bruere, 1 S. & R. 363; Jack *v.* Shoemaker, 3 Binn. 280.

[1] As to the making of affidavits of defence, under the statute, by another than the defendant, see Bright. Dig. 1964.

[2] Act 3d April 1781. 1 Sm Laws, 519.

Wallace v. Fitzsimmons.

By the Court.—The words are so very general and comprehensive, that, if the spirit and intention of the law, expressed in the preamble and other sections, were not to be considered, they would include every case arising between the periods mentioned in the act. But it is inconsistent with the constitution, and with justice, that the trial by jury should be taken away in this manner; and therefore, the courts of justice have always determined, that auditors shall be appointed only where there is a dispute about the depreciation.

The rule discharged.

Hallowell, for the plaintiff. *Sergeant*, for the defendant.

Wallace, surviving partner, *v.* Fitzsimmons, special bail.

Partnership.

Payment by the garnishee in a foreign attachment, of one-half of a debt attached for a partnership claim, to the executor of a deceased partner, is not sufficient to exonerate such garnishee, *pro tanto*, as against the surviving partner.

The case was this: Hoe & Harrison, of Virginia, being indebted to Wallace & Smith, Wallace, as surviving partner of Smith, issued a foreign attachment against them, and attached their effects in the hands of Fitzsimmons. Judgment was obtained on this attachment, at the third term; and, afterwards, Fitzsimmons entered special bail. The cause then proceeded, until judgment was finally *obtained against Hoe & Harrison, and upon the return of a *ca. sa.*, *non sunt invenerunt*, an amicable *scire facias* was entered against Fitzsimmons; judgment was thereupon obtained, and an execution issued for the whole sum recovered against the principals in the original suit. It appeared, that during these proceedings, the executor (who was also the brother) of Smith, the deceased partner, applied to Fitzsimmons, and forbade his paying more than one-half of the money to Wallace; offering an indemnification for the payment of the rest to him, and alleging that the partnership was considerably indebted to the estate of the deceased. Fitzsimmons, accordingly, gave notice of this application to Wallace, and afterwards, paid one-half of the money to the executor; although a letter from him to Wallace was produced, in which he had declared, that he would not pay it either to him or to Smith, but that the law should take its course, and determine the right between the executor and the partner.

*249]

A rule was obtained which, in the argument, the counsel consented to consider, either as a rule to show cause why, on paying to the plaintiff 715*l.* (being one-half of the sum recovered from Hoe & Harrison), the proceedings on the execution should not be stayed; or, as a rule to show cause why the execution should not be set aside, and the judgment opened, in order to let the defendant into a trial, on the plea of payment.

On this rule, two questions were brought before the court: 1st, In point of fact, whether Wallace had acquiesced in the payment of the executor? and 2d, In point of law, whether the payment to the executor did not discharge Fitzsimmons from the demand of the surviving partner?

The defendant's counsel endeavored to show, that Wallace's silence, after he was informed of the executor's claim, amounted to an acquiescence in the payment; and, consequently, that Fitzsimmons, who was an innocent stakeholder, ought not to be made liable for the repayment of the money. 4 Burr. 1985; 2 Ld. Raym. 1210; Bull. N. P. 133.

But as this argument, in point of fact, did not seem to be supported by the testimony, they contended, that, in point of law, the payment of a debt to the executor, or other representative of a deceased person, was a good payment; and that the courts of justice would not unravel it, in an action by a surviving partner, to compel a second payment of the same debt. In this case, they said, it was to be presumed, the deceased did not die insolvent, because he had left a will; and whatever property he was worth, after payment of his debts, the executor, who was also his heir-at-law, was clearly entitled to receive. They allowed, that the surviving partner was the proper person to collect the joint credits; but urged, that, when they were collected, he became merely a trustee for the executor, or next of kin; and hence, they inferred, that if there was really a balance on the company accounts in favor of the deceased partner, a strong principle of equity interposed, that his representatives *should not be compelled to take a circuitous route to obtain it; more particularly, when it must affect the interest of a third person. [*250

But it was answered, for the *plaintiff*, that this was the first instance in which it had been suggested, that an executor of one partner could, in this way, settle the partnership accounts. The law which makes the surviving partner liable for the joint debts, by a necessary consequence, gives him the exclusive control over the partnership effects, and every action, founded on a joint transaction, must be brought in his name. The general rule, indeed, with respect to joint owners, is, that the interest itself shall survive; but in the case of partners in trade, it is only the right of action, and not the interest, to which the survivor is entitled. This right, however, is essential to justice, and for the benefit of commerce; for the inconvenience would be inconceivable, if, upon every suggestion of a balance due to a deceased partner, it was incumbent on the survivor to travel into all the circumstances of the company. In the action between *Mc Cartey*, surviving partner of Cummings, against *Nixon*, it appeared, that the defendant had administered on the estate of the deceased partner, and retained the company effects for a separate debt due to him from Cummings; but the supreme court determined, that the administrator, in that case, had no right to retain: and that he must resort to his action of account-render against McCartey, in order to obtain satisfaction from the joint stock.(*a*)

With respect to the presumed acquiescence of Wallace, it was observed, that the evidence contradicted the presumption; and that, independent of every other consideration, Wallace's continuing to prosecute the suit, amounted to a prohibition. There is, therefore, no fact upon which the cause could be submitted to a jury; whether the payment to the executor is good, or not, being a matter of law.

(*a*) See this case briefly stated, in a note to 2 Dall. 65.

Shippen v. Bush.

SHIPPEN, President.—It may probably be a hardship upon the defendant, but he has certainly made himself liable to the plaintiff's demand. A payment to an executor or administrator, can be no satisfaction to a surviving partner, who has the sole right of suing for, and of receiving the moneys due to the company. The point of law is, therefore, exceedingly clear. Nor can we, in this manner, attempt to investigate the partnership accounts.

With respect to the point of fact, it does not seem to be at all established. If, indeed, the acquiescence of the plaintiff had been proved, we should have thought it a proper subject for a jury to determine. But, as the matter stands, we must leave the defendant to his consolation, that even if he has not already taken an indemnification, he may recover the money back from the executor, having paid it in his own wrong.

The rule discharged.(*a*)

Lewis, for the plaintiff. *Wilson* and *Rawle*, for the defendant.

---

*251] *SCHLOSSER *v.* LESHER.

Practice.—Rule for trial or non pros.

INGERSOLL read an affidavit, stating the want of a material witness, who had been *subpœnaed*, and moved to put off the cause for that reason.

Levy prayed, that, if the cause was continued, it might be under a rule to try next term, or *non pros*; and mentioned a case argued in this court by *Lewis*, when it was so ruled.

Ingersoll objected, that the rule for trial or *non pros*, was granted upon some *laches* on the part of the plaintiff; and that there was no idea of that kind in the present case. He added, that the practice in the supreme court was contrary to the rule prayed for.(*b*)

BY THE COURT.—Let the rule be entered: but this will not preclude the plaintiff from showing reasonable cause of delay, at the next term.(*c*)

SHIPPEN's Lessee *v.* BUSH.

Reference.—Agreement of attorney.

BANKSON moved for the appointment of referees in this casue, in the absence of the opposite counsel; though, as he said, by agreement. But—

BY THE COURT.—It is an invariable rule not to appoint referees, but in the presence of both parties. So many disputes have arisen about what was the meaning of the attorneys, that we have determined not to pay any regard to agreements, which are not reduced to writing.

(*a*) Bell *v.* Newman, 5 S. & R. 86; Penn *v.* Butler, 4 Dall. 354. See Alexander *v.* Coulter, 2 S. & R. 494;

(*b*) Hannum *v.* Gregg, 2 Yeates 240; Todd *v.* Thompson, 2 Dall. 105.

(*c*) See Bowen *v.* Douglas, 2 Dall. 44.

Gilpin *v.* Semple.

Practice.—Rule to take depositions.

Hallowell moved for a rule to take the depositions of going witnesses, &c., before the return of the writ in this cause.

By the Court.—It has not been determined, upon argument, though often mentioned at the bar, whether we can grant the rule, before the return of the writ, or not. But it has been the practice to take the deposition, *de bene esse*, under a rule, subject to the opinion of the court; and this upon the authority of the case in Sheridan. Notice, however, should be given to the defendant, as no appearance, by attorney, can be yet entered.(*a*)

---

*Robertson *et al. v.* Vogle. [*252

Notice of non-payment.

If the holder of a promissory note neglect to give notice, in a reasonable time, to the indorser, of non-payment by the maker, or receive part of the money from the drawer, and give him further time for the balance, the indorser will be discharged.

What constitutes reasonable notice, is a matter of *fact* for the jury to determine.

In this action, the plaintiffs declared, as indorsees, upon a promissory note, against the defendant, as indorser, both the parties residing in the city of Philadelphia. It appeared on the trial, that the note was drawn on the 10th April 1786, and that it was protested for non-payment on the 12th June 1786; but on the 5th of July, and on the 23d of August following, the plaintiffs received several partial payments from the maker, without attempting to give notice of the protest to the indorser, until after the last of those payments, when the maker had become greatly embarrassed in his circumstances. Nor was there, indeed, any other evidence of notice, previously to the commencement of the action, to March term 1787, than that the plaintiff's clerk had frequently called at the defendant's store, but was not certain, that he had ever seen him, or left a note of his business.

Ingersoll moved for a nonsuit, on two grounds: 1st. Because the receipt of a part of the money from the maker, is a discharge of the indorser for the whole: and 2d. Because the plaintiffs did not give reasonable notice of the protest to the defendant.

1st. On the first point, he contended, that the indorser of a promissory note is only a warrantor that he will pay the money, if the maker does not; and that if the indorsee receives a part, he takes upon himself to give credit to the maker, and discharges the indorser. *Hall* v. *Pitfield*, 1 Wils. 46; s. p. *Kellock* v. *Robinson*, 2 Str. 745.

2d. With respect to the second point, he cited *Tindal et al.* v. *Brown*, 1 Term Rep. 167, Easter, 27 *Geo. III.*, where it is said, that when a note is not discharged by the maker, the holder must give reasonable notice to the indorser; that this means something more than making it known; for it is

---

(*a*) See Stotesbury *v.* Covenhoven, *ante*, p. 164, and the note to that case.

not enough, that he says the maker has not paid, but he must declare that he does not mean to give credit; and therefore, when the circumstances are ascertained, what is reasonable notice, is a question of law, and not of fact. As to the giving time, the holder does it at his peril, for it has never been determined that the indorser is liable, where the holder has given credit to the maker; so that the want of notice is tantamount to payment. Id. 712.

Sergeant and *Barton*, for the plaintiffs, argued: 1st. That the acceptance of a part shall not prejudice the holder of a bill or note; Marius 6, 8, 9, 86, 87; and, as upon the authority of this book, the court had determined a former question,(*a*) they said it could not be shaken, in the present instance, by 1 Wils. 46, which was not a decision in the principal case, but an *obiter dictum*, referring to a preceding determination for an argument *à fortiori;* nor by 2 Str. 745, which was a short *nisi prius* note. Besides, these reports give no reason for their decisions, but Marius assigns a very satisfactory one for his doctrine; to wit, that it is beneficial to the indorser

*253] that the *holder should receive as much of the money as he can from the maker, since thereby so much is saved to him. There is a material difference, however, between the principles and usage in London and Amsterdam, and the custom of Philadelphia, upon this, as well as the point of notice; for long indulgence and the course of business, have not yet brought us to the precise and strict practice of those capitals.

2d. With respect to the second objection, they said, that the plaintiff's clerk went repeatedly in pursuit of the defendant; and proof of making inquiry after him is sufficient to excuse giving notice, unless he shows that he might have been found. Bull. N. P. 273, 274. But, at all events, they insisted, that what was reasonable notice was a matter of fact, and not of law; 1 Str. 508; 2 Id. 829, 1175; 1 W. Black. 1. For, though it is true, that there are many facts, upon which, if the jury proceed contrary to the opinion of the court, a rehearing will be granted; yet they must, at last, be determined by a verdict. In trover, for instance, the conversion can only be found by a jury, it cannot be found by the court. That reasonable notice is a fact of the same kind, was conceded by very eminent counsel (Dunning), in opposition to the interest of his client. Doug. 496–7. The propriety of the rule is abundantly more striking here than in England; and as a jury alone can decide upon the circumstances of the country, and the relative situation of the parties, it ought to be left to them to ascertain the reasonableness of the notice.

Ingersoll, in reply, said, that the case was of great importance to the mercantile interest; and that the mischief would be fatally extensive, if the adverse arguments prevailed. He contended, however, that in whatever form the plaintiffs choose to proceed, they must fail in their action. For, if they bring their suit at common law, then it cannot be maintained at all; since, at common law, a *chose in action* is not assignable; nor is an assignor responsible, unless he expressly warrants; and, if they bring it upon the custom of merchants, then, in order to recover, they must show that they have, on their part, complied with the custom, which required that reasonable notice of the non-payment should have been given to the defendant. But,

(*a*) In Gerard *v.* La Coste, *ante*, p. 194.

as the common law is not applicable, and the act of assembly does not meddle with the case of indorsers and indorsees, the declaration must undoubtedly be founded upon the statute of *Anne*, and the custom of merchants; and if the plaintiffs are allowed to take advantage of these to maintain their action (waiving the question whether the statute extends to this country), the defendant cannot be precluded from taking advantage of them, likewise, to support his defence. Upon this ground, the usage must be universal; for, the statute of *Anne* places promissory notes on the same footing with inland bills of exchange, and inland bills of exchange, in the preceding reign of *Wm. III.*, had been placed on the same footing, with foreign bills—so that any distinction between the cities of Amsterdam and London, and *the city of Phi'adelphia, cannot be maintained; the usage is everywhere the same, and the construction of the statute will not be different, merely from a difference in the place. [*254

It is settled, by the common law, as well as under the statute, that he who gives a new credit is bound; this is not contradicted by the doctrine laid down in Marius; and the case in Lord Raymond is corroborative. In Marius, the money is presumed to be received at the time the note becomes due, the protest is made at the same instant, and notice of the dishonoring is given as soon as possible—so that there, undoubtedly, the indorser is benefited by the indorsee's taking a part of the money, and runs no risk for the want of information respecting the fate of the bill or note; but in the present case, the money was received, at least, three months before any attempt to give notice, and in the meantime the maker became insolvent. The court argue in Wilson, as from a fixed principle, that the indorsee's receipt of a part from the maker is a discharge of the indorser for the whole; and Strange, though a *nisi prius* report, is in point in all its circumstances.

He contended, that the case cited in Bull. N. P. was in favor of the defendant, on the second point; for he had shown, that he might easily have been found; and where the parties reside in the same town, not a moment should elapse between the protest and the notice. 1 T. R. 167. The supreme court, in *Steinmetz* v. *Currie*,(*a*) said, that in all universal questions of a mercantile nature, the Term Reports were to be received as authority; this was resolved, in opposition to cases for 100 years back, showing a different practice with respect to notice; and in *Donaldson* v. *Cooper*,(*b*) the judges refused to hear the evidence of merchants as to usage, because the point had already been determined. As, therefore, it has been settled, that reasonable notice is a question of law, and not of fact, the plaintiff cannot now bring it into doubt and controversy.

SHIPPEN, President, delivered the opinion of the court to the following effect.—

This is a motion for a nonsuit, upon two grounds: first, that the plaintiff, by an acceptance of part of the money from the maker of the note in question, has discharged the indorser; and secondly, that he is also discharged, because due notice of the non-payment of the note was not given to him. It is to be observed, that with regard to discharging the parties to

---

(*a*) *Post*, p. 270.
(*b*) See also Henry *v.* Risk, *post*, p. 265.

bills of exchange, the law makes a material difference; for some of them can only be discharged by an express, but others may be discharged by an implied exoneration. Thus, the acceptor of the bill cannot be discharged by any construction in law; and though the holder proceeds against the indorser, and receives part of the money from him, this will not prevent his afterwards resorting to the acceptor for payment of the balance. *Dingwall* v. *Dunster*, Doug. 235. In the instance of a promissory note, the maker stands in the place of an acceptor. *Johnson* v. *Kennion*, 2 Wils. 263.

*255] But an indorser is only a security that the *acceptor of the bill, or the maker of the note, shall pay the money; and therefore, if the holder is guilty of any neglect in endeavoring to recover it, that will certainly be an implied discharge of the indorser. If, for instance, the holder takes upon himself to give further time for payment, or receives a part of the money, and gives time for the rest, the nature of the transaction is essentially changed, and the indorser is no longer responsible.(*a*) The same principle applies to the second point; for, if the holder of a note, without giving notice to the indorser of its being dishonored, retains it so long in his hands, after the day of payment, as to create a presumption that he means to take upon himself to give a new credit to the maker, the want of notice in this case will likewise operate as a discharge.

This, however, cannot be determined in the same manner here, that it is in England. In that country, regular posts are established, the correspondence between the great commercial towns punctually maintained; and the communication, throughout the kingdom, is commodious, certain and uninterrupted. These circumstances, therefore, render it easy to make a general rule—of which the cases cited for the defendant from Term Reports, expressly speaks. But in Pennsylvania, there are some roads which the posts never travel, and some seasons in which the communication between the different parts of the state, is exceedingly difficult and precarious: How then can a general rule be made, so as to ascertain everywhere, and at all times, the reasonable time of the notice? The attempt, if not totally impracticable, would, in its consequences, be dangerous and inconvenient.

But, with regard to the particular case before us, there can be no doubt that the right of indorsees to call upon the indorsers, must be founded upon the custom of merchants: for, the indorsement, considered at common law, amounts only to an assignment of all the property in the bill or note, without making the assignor responsible, in the event of a non-payment. How far, however, promissory notes are, in this state, upon the same footing with bills of exchange, is a question *sub judice* in the supreme court;(*b*) and therefore, it would be going out of our duty to give a decision upon it at this time. Yet, it must be observed, that the statute of *Anne* has, in some respects been extended to this country.(*c*) For the uniform practice has been, to bring actions upon promissory notes, as such; and not actions

---

(*a*) It has been held, that the indorser is not discharged, by the holder taking from the maker, a mortgage, of the same date with the note, as collateral security for payment of the note. Ligget *v.* Bank of Pennsylvania, 7 S. & R. 218.

(*b*) In the case of McCullough *v.* Houston, *post*, p. 444.

(*c*) Stat. 3 & 4 *Anne*, *c.* 9; "The 1st, 3d, 4th and 8th sections of this statute are in force." Report of the Judges of the Supreme Court.

of *indebitatus assumpsit*, which was the proper action, according to the opinion of HOLT, Chief Justice, before the passing of that statute. The legislature, likewise, when regulating the assignment of bonds and notes, though they did not expressly put them on the same footing with bills of exchange, must, from the terms of the act, have taken it for granted, that an action might be brought upon a promissory note, considered as an instrument. Until, therefore, a contrary decision is pronounced, we must proceed as in the case of a bill of exchange, under the statute of Anne; and there it appears, that a very trifling negligence, on the part of the holder, *will operate as a discharge of the indorser. This rule we admit, is just [*256 and proper, when the course of trade is regular, and the communication by post is uniform and free. For, as it is usual among merchants, to lend their names to one another, all faith and credit would be at an end, if the holder of a note, instead of attempting to procure the payment from the person who ought really to pay it, might, tacitly, keep it in his possession, until the insolvency of the maker had deprived the indorser of his only remedy. If, therefore, he retains it two or three months, or any other unreasonable period, he ought certainly to bear the loss; and accordingly, the law deems this the giving of a new credit to the maker, and discharges the indorser.

Upon the whole, the facts in the present case are strong in favor of the defendant; but still we should be sorry to take it from the determination of the jury, upon a question respecting the reasonableness of the notice; for, as it has been already said, it is impossible to establish a general rule, alike applicable to all the parts of the state; and until such a rule can be established, every case, upon its own circumstances, must be left to the jury, as a question of fact, and not of law.(*a*)

The jury afterwards gave a verdict for the defendant.

(*a*) See the note to Steinmetz *v.* Curry, *note*, p. 234. The determination of President SHIPPEN, in this case, to leave the question of the reasonableness of the notice to the jury, as a question of fact, was adopted by the supreme court in several subsequent decisions. See Mallory *v.* Kirwan, 2 Dall. 192; Warder *v.* Carson's Ex'rs, Id. 233; s. c. 1 Yeates, 531; Bank N. A. *v.* Pettit, 4 Dall. 129; Ball *v.* Dennison, Id. 165. In the last reported case on this subject, however, Gurley *v.* Gettysburg Bank, 7 S. & R. 324; C. J. TILGHMAN, after quoting with approbation a remark of C. J. MCKEAN, in Warder *v.* Carson, 1 Yeates 531; that a distinction exists between notes discounted by the banks in Philadelphia, and in the country, in this respect, observes of the former, that "there will be little difficulty, when a case occurs, in settling the law with regard to them." "But," he adds, "I am satisfied, that an attempt to lay down any general rule, at this time, applicable to all notes discounted in the country banks, would be unjust and dangerous. . . . And as to individuals in the country, who hold indorsed notes, never discounted by any bank, I am well assured, that there is no general understanding of any particular time of giving notice."[1]

[1] It is now well settled, that what is due notice of non-payment of a promissory note, so as to charge the indorser, when the facts are undisputed, is a question of law for the court, and not one of fact for the jury. Stockert *v.* Anderson, 3 Whart. 116; Jones *v.* Wardel, 6 W. & S. 399; Brenzer *v.* Wightman, 7 Id. 264; Holz *v.* Brown, 5 Penn. St. 178; Sherer *v.* Easton Bank, 33 Id. 134. So, as to what is due diligence in making a demand upon the maker. Bennett *v.* Young, 18 Id. 261; Smith *v.* Fisher, 24 Id. 222.

SUPREME COURT OF PENNSYLVANIA.

APRIL TERM, 1788.

HOLLINGSWORTH *v.* OGLE *et al.*

Plea of payment.

In debt on bond, on the plea of payment, the jury in this state may, and ought, to presume everything to be paid, which, *ex æquo et bono*, ought not to be paid.

THIS was an action of debt, brought upon a bond, dated the 5th June 1779; the penalty of the bond being in "200*l.* hard money, computing half joes at 3*l.*;" and the condition for the payment of "the full and just sum of 100*l.* hard money or specie, computing half joes at 3*l.*; on the expiration of five years, from the date, with lawful interest," &c. The defendants pleaded *payment*, to which the plaintiff replied, *non solverunt*, and issue was thereupon joined.

It appeared at the trial, that the bond was given in consideration of a sum of 500*l.* *continental currency*, lent by the plaintiff to the defendants, in June 1779, when the scale of the depreciation estimates that money at twenty for one.

Ingersoll and *Sergeant*, for the defendants, contended, that the plaintiff's demand was of an usurious nature, and so unreasonable, that it ought not, in equity and good conscience, to be allowed. They admitted, that the jury could not set aside the contract of the parties; but insisted, that they might, and in this case ought, to give only damages, according to what was just and reasonable; and that they were not bound to find the sum expressed in the bond. 2 Vern. 402, 121; 1 Atk. 351; 2 Kaim's Princ. Eq. 70; 2 Eq. Abr. 186, pl. 9; 2 Vern. 14; 10 Mod. 503.

Lewis, for the plaintiff.—This is an action of debt upon a bond, and therefore, the case of damages is not applicable, unless the jury shall think proper to give anything beyond the penalty. There is nothing usurious or unreasonable in the contract; for, at the expiration of the five years, in which the bond was made payable, if the continental money had appreciated, the plaintiff would have been a considerable loser. Besides, an act of assembly
*258] declared, that a *continental dollar should be equal to gold and silver; and the money being a legal tender when lent, the defendant may have paid a specie debt with it. Nor can a question of usury be considered in this action; for, the act of assembly does not make the contract void on

that account, as the English statute does, but only inflicts a forfeiture, equivalent to the money or other article lent, which must be recovered in another suit. In the case of *Lee* v. *Biddis* (*ante*, p. 175), this court refused to let in evidence, to show what was meant by current lawful money, expressed in the contract, because it would tend to contradict, not only the contract, but likewise the act of assembly establishing the scale. Here, the contract is expressly for the payment of hard money, and as the law only fixes a scale for the payment of contracts in continental money, where no tender has been made, the jury cannot set aside the solemn act of the parties, but ought to find a verdict generally for the plaintiff. (1 Sm. Laws, 519; 2 Id. 1.)

McKean, Chief Justice.—The plaintiff states that the defendants owe him 100*l.*, and in order to prove his allegation, he produces their bond, dated on the 5th of January 1779, payable five years afterwards, that is, on the 5th of June 1784. In answer to this demand, the defendants have pleaded *payment* (which, in such cases, is made the general issue, by a law of the state), and they have shown, in support of their plea, that the bond in question was given in consideration of 500*l.* of continental paper, lent by the plaintiff to the defendants, at their instance, when it was worth no more than at the rate of twenty continental dollars for one in specie. Upon these circumstances, it is to be determined, how much, if anything, the plaintiff ought to recover in the present action.

In cases for which the positive law has clearly and expressly provided, it is the duty of courts and juries to be governed in their decisions, by the rule that is there prescribed; for courts of chancery, and the general principles of equity, can never be allowed to contradict or defeat the express provisions of a statute; and even where there is no act of assembly to direct us, the common law, recognised and ascertained by the adjudications of the courts upon the same subject, often furnishes a guide to which we are bound to yield attention and obedience; for, the maxim is certainly just, that it is better the law should be determinate and fixed, although it were originally erroneous, than that it should be precarious and fluctuating, according to the different talents and dispositions of the judges, who are appointed to administer it. But, in the present case, the positive law is silent; and, though many authorities in the books have been referred to, not one has been discovered, which is strictly analogous to the question under our immediate consideration. There is, indeed, an act of assembly, passed on the 21st of June 1781 (2 Sm. L. 1), the 5th section of which seems to relate, in some degree, to the present controversy, when it enacts, that "all debts, &c., granted and contracted for by any deed, will, &c., since the 1st day of January 1777, which were expressed to be paid and discharged *in [*259
any foreign money, or in gold or silver money of any denomination, or in bullion, or in any commodity, and which have not since been paid and satisfied or discharged, shall be deemed, construed and taken to be yet due and owing from debtors to creditors, in such money or other commodity, as in the said contracts were expressed, and the same may be sued for and recovered in any court, &c., in so much gold or silver money as shall be equal in value to the debt or duty, according to the contract." But the meaning of this section (and in the interpretation of laws, recourse must always

be had to the meaning of the legislature) is only this: that, where a contract had been made for payment in specie, in foreign gold, in bullion, or in any specific commodity, the creditor is entitled to recover according to the stipulations of that contract.[1] This, therefore, does not reach the present point; for, although the bond is payable in *hard money*, the dispute arises upon the *actual depreciation*, which rendered 500*l.* continental money, of considerable less real value, at the time of entering into the contract, notwithstanding the laws of the state had declared it to be equivalent to specie, of any denomination then circulating. If, indeed, this had been a bond for the payment of continental money, there is no doubt that, by the act of assembly just cited, only so much specie, as the 500*l.* was really worth, could be recovered by the plaintiff; but it is a bond for the payment of *hard money*, in consideration of a loan of *continental money*, and hence the difficulty occurs.

It is unnecessary to review all the authorities that have been read, from the different reports of decrees in chancery; which have, in general, proceeded upon the ground either of fraud, of surprise, of the suggestion of a falsehood, of the suppression of a truth, or of the unreasonable and unconscionable nature of the contract itself. The last of these being the only case that can be applicable to the subject before us, our inquiry is reduced to one point, to wit, whether the contract now litigated is so unreasonable in its nature, as to have become iniquitous, and therefore, ought not to be countenanced in a court of justice? The arguments appear to be strong on both sides, particularly in the two cases, which have been opposed to each other, by the contending counsel. On the one hand, where a man has borrowed 1000*l.* in continental money, which, before the day of payment, had unexpectedly risen seventy-fold in value, it would certainly be hard to compel him to return 70,000*l.* for the use of the 1000*l.* which he received: and, on the other hand, it is equally true, that where 500*l.* continental money has been loaned, in consideration of a bond for 100*l.* specie, the lender can never claim any more than the last-mentioned sum, though a change in the public credit and circumstances should have made the 500*l.* continental money equal to specie, and by that means, he has sustained a loss of the difference between the two sums.

It is likewise to be considered, that when the contract was entered into between the plaintiff and defendants, the paper medium of the United
*260] States was in a very fluctuating condition; and, though *the event has shown the fallacy of the opinion, there were not wanting many good and intelligent men, who strongly maintained, that the continental money would eventually be redeemed, according to its nominal value. This far however, is clear, that the law, at that time, did not acknowledge the current depreciation, so that the defendant might legally have satisfied any specie debt, with the money which the plaintiff had advanced. Nor was it then customary to lend merely for the interest; but a practice had prevailed of making loans upon bonds payable in dollars, or for bills of exchange payable in France; and although very usurious and exorbitant profits were thus

[1] See Frank *v.* Colhoun, 59 Penn. St. 381; Dutton *v.* Pailaret, 52 Id. 109; Rankin *v.* Demott, 61 Id. 263; Mather *v.* Kinike, 51 Id. 425; Christ Church Hospital *v.* Fuechsel, 54 Id 71; Bronson *v.* Rodes, 7 Wall. 229.

accumulated, yet it is said (and I believe it to be true), that there was no law that could prevent or suppress the mischief. Indeed, after much consideration, this court entertains the opinion, that there would not be anything illegal in taking a bond for 200*l.* of the last state emission of bills of credit, when only 100*l.* had been lent; for that paper money is only made a tender and payment of debts due to the commonwealth, and in every other respect, must be considered merely as an article of merchandise. But the case before us is of another nature; it is that of a bond payable in *hard money*, given in consideration of a sum lent in *continental money*, which the law then declared to be, in all cases, a good and sufficient tender and payment.

Since, therefore, we have no rule to guide us, but the exercise of a legal discretion, it may be proper to reflect, that it will be as inconsistent with equity to give too little, as to give too much. If the plaintiff's demand would amount to seventy or a hundred fold the value of the money he advanced, it would, perhaps, be wrong to allow it; but, whether a less, and what sum would be an unreasonable profit, must depend upon a consideration of the advantage which the defendant might have derived from the loan, the loss which the plaintiff might have sustained, the length of the credit given upon the bond, and the possible insolvency of the obligors. These circumstances certainly entitle the plaintiff to something more than the common interest of money—what advance a court of chancery would decree, we cannot ascertain with precision; but it seems, that more than double the sum, has been generally determined to be unreasonable and unconscionable.

The court, upon the whole, are unanimously of opinion, that in action of debt, brought upon a bond, and where the issue is joined upon a plea of payment, the jury may, and ought to presume everything to have been paid, which, *ex æquo et bono*, in equity and good conscience, ought not to be paid.(*a*) Such is the current of the determinations in the court of chancery of England; and the same principle is recognized in the case of *Moses* v. *Macferlan*, 2 Burr. 1005, for, though the courts of justice cannot alter or destroy the contract of the parties, they may interpose to render it conformable to reason, justice and conscience.

RUSH and BRYAN, Justices, concurred.

The jury found a verdict for the plaintiff in the sum of 76*l.* 10*s.*, with six pence costs.

(*a*) See Sparks *v.* Garrigues, 1 Binn. 152; Robinson *v.* Eldridge, 10 S. & R. 142; and the note to Swift *v.* Hawkins, *ante*, p. 17. And see Roop *v.* Brubacher, 1 Rawle 308; where the effect of a plea of payment, with leave, &c., was examined by Judge HUSTON.[1]

[1] Under the plea of payment with leave, &c., the defendant may give in evidence any equitable defence. Miller *v.* Henderson, 10 S. & R. 290; Hain *v.* Kalbach, 14 Id. 159; Light *v.* Stoever, 12 Id. 431; Uhler *v.* Sanderson, 38 Penn. St. 128.

*Chapman *v.* Steinmetz.*

Damages on protested bill.

The payee of a bill, which was neither paid nor received in satisfaction of a precedent debt, but upon the condition of its being honored, is not entitled to recover the twenty per cent. damages, on protest.

This was an action brought upon a bill of exchange, drawn by the defendant in favor of the plaintiff, and by him indorsed in blank; and a count for money had and received, &c., was added in the declaration. The bill being returned protested, a question arose, whether the plaintiff was entitled to recover twenty *per centum* damages?

The defendant contended, that the damages ought not to be allowed, because the bill was neither paid nor accepted, in satisfaction of the debt for which it was drawn; and to prove this, a receipt was produced from the plaintiff in the following words: "Received, 1st of Sept. 1784, of Mr. Jn. Steinmetz, a set of bills, dated the 30th August last, on John Bulkley & Co. of Lisbon, for 478*l.* 17*s.* 7*d.* sterling, which *when paid* will be in full for the balance of account due to the estate of the late Wm. Neale of London, deceased."

By the Court.—It is clear, that the bill was neither paid nor received in satisfaction of the precedent debt, but upon the condition of its being honored: it has not been honored; consequently, the parties are in the same situation, as if it had never been drawn; and the plaintiff (who was, in fact, agent for the drawer, and to receive the money as his servant) cannot be entitled to recover damages. See *Dehers et al.* v. *Harriot*, 1 Show. 163. The same point was determined in *Watts* v. *Willing*, tried the last term.(*a*)

Upon this opinion, judgment was entered, by agreement of the parties, for the principal of the original debt, and interest from the time that the account between them was liquidated.

Wilcocks, for the plaintiff. *Ingersoll*, for the defendant.

Phelps *et al. v.* Holker *et al.*

Conclusiveness of judgment.

A judgment obtained in a court of another state, *in a foreign attachment*, is not conclusive evidence of the debt, in an action brought in this state, on the judgment.

A foreign attachment issued in Hampshire county, in the state of Massachusetts, against the defendants, to which the sheriff made return, that "he had attached one blanket, shown to him as the reputed property of the defendants;" and no appearance being entered, judgment was given for the plaintiff at the second term. An action of debt was afterwards brought here, upon this judgment, and a question stated for the opinion of the court, to wit, "whether the judgment was conclusive evidence of the debt."

(*a*) 2 Dall. 100; s. p. Keppele *v.* Carr, 4 Id. 155; and see Evans *v.* Smith, 4 Binn. 366; Brown *v.* Jackson, 1 W. C. C. 512; 2 Id. 24.

Phelps v. Holker.

Ingersoll, for the plaintiff.—An action of debt lies upon foreign judgments; though, it is true, they are only *primâ facie* evidence of the debt, and may be inquired into. Doug. 1. But the judgment, upon which the present action is brought, cannot be considered as a foreign judgment, for, it is the record of a court of one of the states of the Union, and, as such, it is entitled to full faith and credit in each of them. Art. of Confed. art. 4.

Bowie, for the defendant.—Judgments given in one state are not made obligatory upon the courts of another, by the articles of confederation; which only provide, that, in matters of evidence, *mutual faith and credit shall be given to the records, acts and judicial proceedings of the states. But even if they were not, in this respect, generally considered as foreign judgments, the inconvenience and injustice of receiving them as conclusive evidence, when obtained by the process of a foreign attachment, must necessarily create an exception. The present judgment was obtained in a foreign attachment, which is strictly a proceeding *in rem*. No defence was made, nor was any notice given to the defendant, or to any person in his behalf; but the mere attachment of a blanket, reputed to be his property, is the sole foundation upon which the jurisdiction of the court in Massachusetts has been exercised. If, therefore, the construction raised by the plaintiff, were to be received by the court, the most iniquitous and oppressive consequences would ensue. A judgment might be entered in Georgia, or New Hampshire, against a citizen of this state, upon a fictitious and fraudulent claim, and it would be impossible that he should obtain any redress, since his first knowledge of the suit would be the production of that record, into the justice of which, it is contended, the court cannot examine, but must admit the judgment as conclusive evidence of the plaintiff's demand. The court will not construe the articles of confederation, so as to introduce and tolerate an evil of such enormity; and of which the present case would be a striking example.

[*262

Ingersoll, in reply.—The subject before the court is naturally divided into two points: 1st. Whether a judgment in a sister state, is of no other force in Pennsylvania, than a judgment in the courts of England or Ireland? and 2d. Whether there is any difference between a judgment in a foreign attachment, and one obtained in any other species of action.

1st. Upon the first point, it is to be observed, that although the rule is established in Europe, that an action may be brought on a foreign judgment, which is there received as *primâ facie* evidence of the debt, there is still this difference between foreign and domestic records, that the former may be examined into, but the latter cannot be controverted or denied. Of this distinction, the authors of the articles of confederation must have been perfectly apprised; and therefore, it is reasonable to presume, that by introducing an express provision upon the subject, they intended to place the states upon a different footing with respect to each other than with respect to foreign nations; for, if they did not mean to make any alteration in the system already established, between independent and unconnected countries, they would either have been totally silent, or they would have qualified the terms of the article, so as to have met their object fully and unequivocally. But, having premised, that "the free inhabitants of each state shall be entitled to all privileges and immunities of free citizens in the several

states" (so that, in fact, a citizen of New Hampshire, the moment he enters South Carolina, derives from this sentence a title to the privileges of citizenship in that commonwealth also), the article concludes that "*full faith and credit* *shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." Art. 4. This, then, is a Union of which no precedent is to be found in any other part of the globe (for the Swiss Cantons do not furnish a strict analogy), and its design must certainly have been, to form a stronger cement, than that by which the states themselves were hitherto connected, or by which they are, at this day, connected with other nations. If, indeed, it was intended by this article, that a judgment in a sister state should have no greater force or validity, than a judgment in France or England, would it not have been absurd to say that "*full* faith and credit shall be given," when nothing more was required, than that the record should be considered as *prima facie* evidence of a fact, which was still liable to exception and denial? On the other hand, if it is admitted, that by this article, the authors of the system intended to make a judgment in New Jersey as binding in Pennsylvania, as if it had been obtained in any county of this state, no other form of words, or mode of expression, could have been selected more clearly to convey that intention. The very term *record* must be conclusive; for what is a record in one state, by this article, becomes such in every state, and it is the nature of a record, to preclude every idea of scrutiny and contradiction.

*263]

2d. With respect to the second point; there can be no difference between a judgment in a foreign attachment, and one obtained in any other species of action, since the defendant, by entering special bail, at any time before payment of the money, may dissolve the attachment, and contest the plaintiff's demand, in that court in which it was originally made. Nor is it a greater hardship to compel him to do so, than it is to require the plaintiff to bring all his witnesses hither from a distant state. Besides, in cases of attachment, judgment is never given before the second term, and the garnishee has it always in his power to send notice to the defendant.

The court expressing a desire to hear the laws of Massachusetts, upon the subject of attachments, *Ingersoll* read the following sections from a law of that state passed *Anno* 32 *Geo. II.* § 2. "It shall and may be lawful for any persons entitled to any action, &c., against any person absconding or absent out of this province to cause the goods and estate of such absconding or absent person to be attached in whose hands soever the same are or may be found; and the attaching any part thereof shall secure and make the whole that is in such person's hands liable in the law to respond the judgment to be recovered upon such process, if so much there be, and no further, and shall be subjected to be taken in execution for satisfaction thereof, or so far as the value thereof will extend, and the person in whose hands they are shall expose them accordingly." § 3, prescribes the notice (*i. e.*, a summons and copy of the declaration) to be given to the agent, &c., of the debtor, in case no goods appear, which being duly served and returned, is made sufficient to bring forward a trial, without further summons, "unless the principal *be an inhabitant, or hath for some time had his residence within this province;" in which case, a like summons and copy of the declaration shall be left at his last place of abode, fourteen days before

*264]

the court. The principal shall be received to defend the suit, "and an imparlance shall be granted at two terms successively, and at the 3d term, without good cause, the action shall be tried;" and, if judgment be rendered for the plaintiff, all the goods, effects or credits of such absent or absconding person, in the hands of such attorney, &c., at the time of being served with the summons, to the value of such judgment (if so much there be), shall be liable and subjected to the execution granted upon such judgment, for or towards satisfying the same, &c. § 4, provides, "that, if the attorney, &c., summoned shall come in the first term, and swear that he has no effects, the plaintiff shall be nonsuited with costs." § 8. "Any absconding or absent person against whom judgment shall be recovered as aforesaid, shall be entitled to a review of the same, at any time within three years after such recovery."

McKean, Chief Justice.—This is a proceeding *in rem*, and ought not certainly to be extended further than the property attached. If that is sufficient to satisfy the plaintiff, he has done well to secure himself;[1] but in the present action, the judgment obtained in Massachusetts cannot be considered as conclusive evidence of the debt, and therefore, the defendant ought still to be at liberty to controvert and deny it. The articles of confederation must not be construed to work such evident mischief and injustice, as are contained in the doctrine urged for the plaintiff.(*a*)

Rush, Justice.—If this judgment were as conclusive as the plaintiff contends, might he not issue an execution at once? But I am likewise of opinion, that it is examinable in the present action.

Bryan, Justice.—By the very words of the Massachusetts act, it is declared, that the judgment and execution in a foreign attachment shall only go against the goods attached.

Atlee, Justice, concurred.

By the Court.—The judgment obtained in the court of the state of Massachusetts, in a foreign attachment, between the same parties, is not conclusive evidence, in this cause, of the debt claimed by the plaintiff.(*b*)

(*a*) The accuracy of this decision will appear from the Journals of Congress, of the 12th of January 1777, when that honorable body was considering certain articles which were proposed to be added to the Confederation. To the clause, that "full credit and faith shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state," it was moved to add, "and an action of debt may be commenced in a court of law of any state for the recovery of a debt due on a judgment of any court in any other state; provided the judgment-creditor shall give bond with sufficient sureties, before the said court, in which the action shall be brought, to answer in damages to the adverse party, in case the original judgment shall be afterwards reversed and set aside, and provided the party against whom such judgment may have been obtained, had notice in fact of the service of the original writ, upon which such judgment shall be founded." But this motion was rejected.

(*b*) The same point was decided in Betts *v.* Death, Addis. 265. Under the provision in the present constitution of the United States, it is settled, that the record of a judgment obtained in one state, is as conclusive evidence of the right which it has decided, as it is in the state where the judgment was given. Green *v.* Sarmiento, Peters C. C 74;

[1] See Morgan *v.* Neville, 74 Penn. St. 52.

*Walton *v.* Willis.

Security for distributive shares.

The orphans' court ought to take *recognizances*, and not *bonds*, for payment of the distributive shares of an intestate's estate.

Where an heir-at-law took an intestate's lands at a valuation, it had been the practice of the orphans' courts throughout the state, only to require him to give bonds to those who were entitled, under the act of assembly, to a distributive share of the estate.(*a*)

The Chief Justice said, in the course of the argument in this cause, that the practice above mentioned was illegal and improper; for, the orphans' courts ought, instead of bonds, which are a mere personal security, to take recognisances, by which the lands themselves would be bound for the payment of the distributive shares. He added, that the court would not enter into a retrospect upon this subject; but that, for the future, they would expect a conformity to the opinion now given.(*b*)

---

3 W. C. C. 17; Field *v.* Gibbs, Peters C. C. 155; Evans *v.* Tatem, 9 S. & R. 260; Benton *v.* Burget, 10 Id. 240. Therefore, the plea of *nil debet* to an action on such judgment is bad. Armstrong *v.* Carson's Ex'rs, 2 Dall. 302. But if the court had not competent jurisdiction (Evans *v.* Tatem, *ut supra*), or, *it seems*, if the proceedings were *ex parte*, and the defendant had no notice (Benton *v.* Burgot, Green *v.* Sarmiento, Field *v.* Gibbs, *ut supra*), the record would not be regarded as conclusive. In Benton *v.* Burgot, Judge Duncan said, "Whether a judgment has been by default, or on trial, makes no difference, provided the party has been notified, "and it was held, in that case, that a plea of fraud, imposition and mistake in obtaining the judgment, was bad on demurrer. See also Kean *v.* Rice, 12 S. & R. 203.[1]

(*a*) For the decision in the principal case, see *post*, p. 351.

(*b*) In Beatty *v.* Smith, 4 Yeates 102; which was an action on a recognisance for a distributive share, the court said that "a recognisance in the orphans' court is in the nature of a judgment," and they refused to admit evidence of circumstances which occurred previous to the recognisance, offered to reduce the amount for which it was given. How far the lien extended; whether, like a judgment, it bound all the lands of the heir by whom it was given and those also of the surety, where there was one, or affected only the particular land taken by the heir at the valuation, has long been disputed. In Taggart *v.* Cooper, 1 S. & R. 497; C. J. Tilghman declined giving an opinion upon the point. In Kean *v.* Franklin, 5 Id. 155, the same learned judge remarked "It is now thirty years since Chief Justice McKean laid it down in Walton *v.* Willis, that a recognisance of this kind was a lien, and therefore, ought always to be taken by the orphans' court; and he censured those courts for sometimes taking bonds which were no lien. From that time, it may safely be asserted, that these recognisances have been generally understood to be a lien." It was decided also, in that case, that the recognisance bound the particular lands in the hands of a purchaser for a valuable consideration, without notice. The question of the extent of the lien was finally decided, in the late case of Allen *v.* Reesor, 16 S. & R. 10; where it was held, that the recognisance bound only the lands of the intestate, taken at the valuation. In the learned and elaborate opinion pronounced by C. J. Gibson, in that case, he examined the law of recognisance, both England and this state, and came to the conclusion, that in the case of distributive shares, the lien of a recognisance existed only by custom, and that the same custom had restricted it to the particular lands taken by the conusor. Of the

[1] See Steele *v.* Smith, 7 W & S 447; Blyler *v.* Kline, 64 Penn. St. 130; Dohner *v.* Miller, 2 Pears. 285.

HENRY, Executor, *v.* RISK *et al.*

Interest.

Interest not allowed on an open account for goods sold and delivered.

THIS was an action brought for goods sold and delivered in the city of Philadelphia, the plaintiff having charged interest upon his acconnt, after allowing six months' credit. Upon the trial, it was admitted, that the net amount of the goods had been paid; and the counsel on both sides agreed, that, whether the interest ought to be allowed, was the only question in the cause.

Ingersoll, for the plaintiff.—A jury may give interest, by way of damages, in an action for goods sold and delivered, when it is the agreement of the parties, when the plaintiff has been vexatiously kept out of his money, or when it is the custom of the trade. Doug. 361. He then offered to prove by witnesses, that it was the custom of the trade in Philadelphia, to allow interest in cases similar to the present.

But by MCKEAN, Chief Justice.—The point has been repeatedly determined otherwise in this court, as well as in the courts of England; and, therefore, witnesses cannot be admitted to contradict the established principles of the law.(*a*) The case in Douglas is confined merely to the American trade. The usage has been otherwise in Pennsylvania, between inhabitants.

Bradford, for the defendants.—Interest shall not be allowed upon an open account for goods sold and delivered. 3 Wils. 206. *Jacob's Claim* v. *Estate of Adams et al.*, *ante*, p. 52.

BY THE COURT.—The question is shortly this: The plaintiff's testator having sold a considerable quantity of goods, wares and merchandise, to the defendants, for which the defendants have paid the net amount, shall interest be allowed upon the account for these goods, wares and merchandise, with-

---

case in the text, he remarked, "Next came Walton *v.* Willis, the authority of which, as a case in point, is absolutely nothing. What was said, was not the point decided, but the *dictum* of a single judge, thrown out in the course of the argument, without reflection, and under a mistaken impression of the law. Still, as the foundation of a practice, which has produced an important anomaly, it is worthy of particular consider ation. But, although it be altogether certain, that Chief Justice MCKEAN was under a momentary impression that a recognisance was a lien generally, yet, what he did say, was in relation to the case immediately under consideration, and was restricted in very special terms, to the lands taken at the valuation, and acquired by the confirmation of the orphans' court; and in this restricted sense, it has been understood by a decided majority of the profession."

Upon the subject of the security given for payment of distributive shares, see also Hubley *v.* Hamilton, 1 Yeates 392; Davis *v.* Houston, 2 Id. 289; Yohe *v.* Barnet, 1 Binn. 358; Taggart *v.* Cooper, 1 S. & R. 497; Kean *v.* Franklin, 5 Id. 147; Reigart *v.* Ellmaker, 6 Id. 44; Kean *v.* Ellmaker, 7 Id. 1; Smith *v.* Scudder, 11 Id. 325; Shaupe *v.* Shaupe, 12 Id. 9; Reigart *v.* Ellmaker, 14 Id. 121; Franks *v.* Groff, Id. 181; and Kean *v.* Ridgway, 16 Id. 60.

(*a*) Robertson *v.* Vogle, *ante*, p. 252; Stoever *v.* Whitman, 6 Binn. 417; Winthrop *v.* Union Ins. Co. 2 W. C. C. 7; Brown *v.* Jackson, Id. 24; Ruan *v.* Gardner, 1 Id. 145; Consequa *v.* Willing, Peters C. C. 230; Garden *v.* Little, 8 S. & R. 533.

out any notice to the defendants, *that interest would be charged, or any agreement, upon their part, to pay it? If this point had not been already settled, it would nevertheless be highly inconvenient to the public welfare (which it is our duty to consider), that the plaintiff's demand should be admitted; for, as the shopkeeper is obliged to retail his merchandise upon a credit, which sometimes terminates in a total loss, and is often unreasonably protracted by the person whom he trusts, his ruin would inevitably ensue, if, besides these disadvantages, the merchant, after a short time, could charge him with interest, the accumulation of which must, insensibly, consume the slow and precarious profits of his business. On the other hand, it is, at once, reasonable and useful, that the accounts between merchants and the retailers should be periodically settled and liquidated; and when that is done, it is easy for the creditor to take a bond, a note, or such other security as will entitle him to interest.

The case, however, does not, at this day, depend upon general arguments; the law, which we cannot alter, has been already ascertained. *Jacobs' Claim* v. *The Estate of Adams and wife*, determined in this court, has been cited for the defendants. In that case, "one Flower having sold lands to Jacobs, died before the purchase-money was paid, or the conveyance executed. His executors, however, received the money, and made a deed for the land. Afterwards, the will, under which the executors acted, was set aside as having been obtained from the testator by practice and undue influence; and letters of administration being consequently granted, the administrators, who had warned Jacobs not to pay the money, instituted a suit against him, and recovered the amount. It was, upon these circumstances, adjudged, that the executors should refund to Jacobs; but that no interest should be allowed, because the money had been received, as well as paid, in a mistake, and no fraud appeared on either side." There have been many determinations in the courts of Pennsylvania, and many authorities may, likewise, be collected from the English law-books, in which the judges have uniformly maintained, that interest shall not be allowed, upon an open account for goods sold and delivered. The case in 3 Wils. 205–6, expressly recognises this doctrine. With respect to the authority cited from Douglas, that evidently relates only to the American trade, in which it appeared to have been the usage for the merchants in England to allow their American correspondents twelve months credit, and then to charge them five per cent. interest; and that the English tradesmen, in the same trade, allowed the merchants fourteen months credit, and then charged them a similar interest. That determination, therefore, does not interfere with the general rule; and the court are unanimously of opinion, that the interest claimed by the plaintiff, upon the present occasion, ought not to be allowed by the jury.

The verdict of the jury was conformable to this opinion.

On the meeting of the court, the next day, the CHIEF JUSTICE observed,
*267] "That in the opinion delivered yesterday, in this cause, *the court had not relied merely on the cases decided here, but on all the cases which had been decided upon the subject, in all the courts of England. These cases, although he had before generally referred to them, he now thought proper to mention particularly, that every doubt upon the question might be finally removed. In the common pleas, for money owing for goods sold

and delivered, no interest shall be allowed. 1 Barnes Notes 157; 3 Wilson 206; Prac. Reg. Com. Pl. 357. In the king's bench, interest refused upon an inland bill of exchange, after acceptance, where no protest; and the court there said, that it had never been allowed barely for money lent, without a note. *Harris* v. *Benson*, 2 Str. 910. In the court of chancery, interest was not allowed on book and simple-contract debts, &c. *Dolman* v. *Pritman*, 3 Rep. Chan. 64.

"Thus the concurrent practice of all the courts in England has, in these cases, disallowed the charge of interest; and the practice of Pennsylvania has been regulated by the same principles. It is not, indeed, more than four years, since, in this state, on the other side of the Susquehanna, the juries have been induced to allow interest, even upon notes of hand."(*a*)

Williams *v.* Geheogan.

Practice.—Special courts.

Moylan, in showing cause against a rule for a special court, at the instance of the plaintiff, contended, *first*, that Williams was not within the description of the persons for whom the act provides a summary relief; and, *secondly*, that the difficulty of obtaining the defendant's testimony at a short notice, was a sufficient reason to induce the court to discharge the rule.

On the first point, it was stated, that Williams was not in America, at the time when the debt was contracted, for which this action was brought; but that he came hither merely to collect the debts of a house in which he had formerly been a partner; that, therefore, he could not claim the benefit of the act, which, it was urged, extended only to foreigners, who came to this country in the way of trade, who resided here, while their merchandise was

---

(*a*) The doctrine laid down in this case was again asserted by C. J. McKean, in Williams *v.* Craig, *post*, p. 313, and appears to have been considered as the settled rule by Judge Yeates, in Christie *v.* Woods, 2 Yeates 215; and by President Shippen, in Rapelje *v.* Emory, *post*, p. 349. In Crawford *v.* Willing (4 Dall. 289 in note), however, Judge Smith declared that the authority of Henry *v.* Risk had been often overruled; and in his charge to the jury, said, "Even in the case of goods sold and delivered, I would think it right to allow interest as soon as the express or implied term of credit had elapsed, and a demand of payment was made." And this is believed now to be the established practice: See 6 Binn. 162, 165. Where there is no usage, no precise time of payment fixed, no account rendered, or demand made, it is said by Judge Duncan, in a recent case (Eckert *v.* Wilson, 12 S. & R. 398), to be usual for the court not to direct interest, *qua* interest, but to leave it the jury, under all the circumstances, to give or refuse damages for the detention. In a still later case (Graham *v.* Williams, 16 S. & R. 257), Judge Rogers, in delivering the opinion of the court, said, "It is more easy to determine what interest shall not, than what shall be allowed, in the case of a running account. It is usually to be left to a jury, under all the circumstances." It was held, in that case, that to balance books at the end of each year, and charge interest on the balance of a running account, was illegal. The decision was expressly restricted to the case of running accounts; and Judge Rogers declared, that it was not intended to interfere with the practice of dealing at six months' credit, which has generally obtained between the merchants of a seaport and those of the country. It was intimated, however, that the allowance of interest had already been extended quite far enough in Pennsylvania.

sold, and who were not punctually paid at the expiration of the credit which they gave. 3 St. Laws, 31. *Lewis* v. *Turner*, in the Common Pleas of Philadelphia, was cited. The plaintiff in that case was a resident of New York, and came to Philadelphia merely to sue, and recover from the defendant. The court determined that he was not entitled to a special court; and SHIPPEN, President, said, that a citizen of the United States was not a foreigner in Pennsylvania.

On the second point, it was observed, that the defendant being sued as supercargo, it would be incumbent on him to state all the accounts of the vessel in question; that he was at this time in Charleston, South Carolina, having in his possession all the documents and vouchers necessary to his defence; that he had always expressed a determination to attend the trial of
*268] the cause, and that his *absence could not be long protracted, as the special bail had sent a bail-place and power of attorney to take the defendant, and surrender him in this court.

Coulthurst, for the plaintiff, said, that the debt was contracted in Philadelphia, and was there due and payable from the defendant to the plaintiff; that Williams came hither to pay the debts of the company, as well as to collect their credits; that he was a foreigner, in the strongest meaning of the word, and, consequently, could not be affected by the case of *Lewis* v. *Turner*, which was decided on the ground of the party's being a citizen.

With respect to the accounts, he endeavored to show from the cause of action, that they could not be material to the defence on this occasion; and contended, that the defendant's absence was no reason to defeat the plaintiff's claim to the benefit of the act.

MCKEAN, Chief Justice.—The act seems to be intended for the benefit of every man, whether an inhabitant or a foreigner, who is about to leave the state; and the plaintiff is clearly within the description of persons entitled to a special court. But, we think, for the second reason which has been urged by the defendant's counsel, that it would be doing manifest injustice to hurry the trial on, at this time: Therefore,

BY THE COURT:—Let the rule be discharged.

GUTHRIE, assignee, *v.* WHITE.

Parties.

The assignee of a simple-contract debt cannot maintain an action in his own name.

A *certiorari* was issued to John Culbertson, Esq., one of the justices for the county of Chester, to remove the proceedings in this cause; and the record being accordingly returned, it appeared, that one Irwin, having maintained the defendant's daughter for several weeks, made out an account against him, and, after swearing to the truth and justice of its contents, he assigned all his right, title and interest therein to the plaintiff. The debt being under ten pounds, the plaintiff, in his own name, sued the father, before the justice, upon this assignment, and obtained a judgment and execution against him; although, as it was stated in the defendant's

deposition,(a) his daughter was of full age, at the time of contracting the debt, and no assumption, upon his part, had been proved or suggested.

Bradford moved to reverse the judgment: 1st, on account of the general irregularity of the proceedings; and 2d, because an action could not be maintained, by the assignee of a simple-contract debt, in his own name.

The Court considered the whole proceedings to have been irregular; but said, that there could be no doubt of the sufficiency of the second reason alone, as a ground for setting them aside.(b) And judgment was accordingly reversed.

---

*Tillier *v.* Whitehead. [*269

Authority of partners.

One of two partners may give authority to a clerk to act in the name of the firm.

This was a feigned issue, to try whether the defendant had a legal authority to use the plaintiff's name, in the acceptance, drawing and indorsement of bills of exchange, and promissory notes. The case was this: Rudolph Tillier and Clement Biddle entered into articles of agreement, on the 30th of January 1783, by which a *special* partnership was established between them. The defendant Whitehead was employed as a clerk by Biddle, in his general transactions; and a memorandum, written and subscribed by Biddle alone, under two firms, that is "Clement Biddle & Co.," and also "Clement Biddle & Co. & Rudolph Tillier," was lodged in the bank; declaring that Whitehead's acceptances, indorsements and drafts, under those firms, were good and binding on the parties. It appeared, accordingly, that Whitehead, as well as Biddle, had used the firm of "Clement Biddle & Co. & Rudolph Tillier;" and an advertisement, subscribed and published by Tillier himself, was read, in which notice was given, that "he had no connection with any other mercantile house, except that known under the firm of 'Clement Biddle & Co. & Rudolph Tillier.'" There was not any proof, however, that Tillier knew of the authority which had been left by Biddle at the bank; but a clerk of the bank proved that he had presented notes drawn by Whitehead in the firm of "Clement Biddle & Co. & Rudolph Tillier," and that, on such occasions, Tillier referred him to Whitehead for payment. It appeared also, that Whitehead had received the proceeds of some damaged tea, which Tillier had sent to the city auction, giving a receipt in the name of "Clement Biddle & Co. & Rudolph Tillier;" that, in consequence of this, Tillier directed his clerk to forbid Whitehead's meddling with any more of his money; and that, sometime afterwards, Tillier desired Whitehead to quit his counting-house, declaring that he had nothing to do with him.

Two questions were stated for the plaintiff: 1st. Whether Clement Biddle and Rudolph Tillier were partners generally, or only for certain

---

(a) See Hindman *v.* Logan, Addis. 27.

(b) See Reed *v.* Ingraham, 2 Yeates 387; 3 Dall. 505; 4 Id. 169; United States *v.* Kennan, Peters C. C. 169.

specific purpose? and 2d. Whether one partner can devolve over the right of using the firm name, without the knowledge and concurrence of the other?

To the first question it was answered by the defendant's counsel, and allowed by the COURT, that the articles of copartnership, being *res inter alios acta*, the limitations could not be known, and therefore, ought not to affect the defendant, if he acted under a legal authority.(*a*)

With respect to the second question, it was unanimously resolved by the COURT, that one of two partners may give an authority to a clerk, under the firm name of the house; and that the clerk may, in consequence thereof, accept bills, and sign or indorse notes, in the name of the company. And it was said by MCKEAN, Chief Justice, that this case could not be properly compared with the case of an attorney, *without power of substitu- *270] tion: for the attorney cannot exceed the letter of his authority, being nothing more than an agent himself; but each partner is a principal; and it is implied in the very nature of their connection, that each has a right to depute and appoint a clerk to act for both, in matters relative to their joint interest.(*b*)

Verdict for the defendant.

Ingersoll, for the plaintiff. *Bradford*, for the defendant.

STEINMETZ *et al. v.* CURRIE.

Notice of non-payment.— Witness.

Notice of the dishonor of a bill of exchange must be given within a reasonable time.
An indorser ruled not to be a competent witness, although the plaintiff offered to strike his name off the 1st and 3d bills of the set; the *second* not being produced.

THIS action, brought by the indorsees of a bill of exchange, against one of the indorsers, now came on for a second trial (*ante*, p. 234). It was very ably discussed by *Ingersoll*, for the plaintiff, and *Sergeant* and *Bradford*, for the defendant; but, as the circumstances and principles of the case are accurately preserved in the charge of the court, it is unnecessary to give any other statement of the facts or arguments, than that delivered by the Chief Justice.

MCKEAN, Chief Justice.—This is an action of very considerable importance, not only as it affects the present parties, but as it affects every holder, drawer or indorser of a bill of exchange. The honor and justice of the state are, indeed, likewise interested, that the decision should be conformable to the general mercantile law of nations, lest a deviation should be imputed to our ignorance or disrespect of what is right and proper. It should be

---

(*a*) See Gill *v.* Kuhn, 6 S. & R. 333; Forrest *v.* Waln, 4 Yeates 337.

(*b*) See Gerard *v.* Basse, *ante*, p. 119, and the note; and see also Baird *v.* Cochrane, 4 S. & R. 397; Salmon *v.* Davis, 4 Binn. 375; Hourquebie *v.* Girard, 2 W. C. C. 212.[1]

[1] In Moddewell *v.* Keever, 8 W. & S. 65, Chief Justice GIBSON, without directly pronouncing on the authority of Tillier *v.* Whitehead, as a precedent, says that each partner is, doubtless, a principal, so far as regards his personal interest in the concern; but an agent as regards the interests of his associates; he would scarce seem, therefore, to be warranted, by principles drawn from analogy, in committing the stewardship of their property to a stranger

remembered too, that the defendant is a stranger, and, that the event of this suit can be no further obligatory elsewhere, than as it corresponds with the universal and established usage of all countries; for, upon the present question, *that*, and not the local regulations of Pennsylvania, must fnrnish the rule of determination.

It appears, then, that one Whitelaw, on the 30th of October 1775, drew a bill of exchange for 339*l.* 18*s.* sterling, upon William Houston & Co., malsters, in Refrew, near Glasgow, in favor of James Witherspoon, or order, and payable on the 1st day of August 1776. This bill, afterwards, but it is not certain at what period, Witherspoon indorsed to Currie, the defendant, who, sometime in the year 1777, indorsed it to Messrs. Archibald and John Blair, and those gentlemen, before the month of October 1778, indorsed it to John Pringle, by whose subsequent indorsement, it became the property of Steinmetz & Bell, the plaintiffs in this cause. It appears further, that Steinmetz & Bell, on the 19th of October 1778, indorsed the bill of exchange to Mr. Freeman, who is now dead, and by whom, in his lifetime, it was transmitted to William Cowpland, of London. The bill seems to have been speedily and regularly indorsed, after it came into the hands of the plaintiffs; and Cowpland, having duly received it from Mr. Freeman, demanded payment of the persons upon whom it was drawn, on the 30th of December 1778, when it was protested, on account of their refusal, for which they assigned *reasons, that can have no effect or relation to the cause. The [*271 notice of this protest was received by Freeman's executor, William Sitgreaves, on the 13th of April 1780, and he gave notice to Messrs. Steinmetz & Bell, on the 28th of the same month; but those gentlemen did not, until the 16th of October 1782, give any notice to Currie, the defendant, who was arrested the day following, to answer in this action.

These are the material facts; and, on them, we are now to inquire, how it happened that the bill lay three years, from the time of drawing to the time of protesting it: for, as between indorser and indorsee, every indorser is considered as a new drawer. The defence, however, is on this single point, that the plaintiffs had notice on the 28th of April 1780, and yet gave none to the defendant, until the 17th of October 1782, a period of two years and a half, except twelve days. Whether that was a reasonable time, will depend upon the circumstances of the case. It appears, that the plaintiffs lived in Philadelphia, and the defendant, when he sold the bill, lived at Fishkill, in the state of New York, about 130 miles off. This, in point of distance, is not so great, but that he might have been found, or, at least, some inquiry made after him, much sooner. We are, therefore, unanimously of opinion, that the delay has been unreasonable; but if they have satisfactorily accounted to the jury for that delay, their verdict will be in favor of the plaintiffs. Were it, however, before us, on a special verdict, we should certainly determine, that it is an unreasonable time.

It is alleged, that the difficulties of the war prevented the giving notice, and that the plaintiffs could not bring their action, until they were in possession of the bill. But is that true? Could not notice be given, notwithstanding the war? They saw the bill and protest in the hands of Sitgreaves, and they knew they became responsible. It was, therefore, their duty to provide for their indemnification, and to give immediate notice. Nor could there be any great difficulty in finding the defendant, for he appears to have

been a man of note, in extensive business, and dealt, at the very time, with Pringle, another indorser of the bill, who lived in Philadelphia, and from whom information might have been obtained. There is, perhaps, an honest and a reasonable ground for not giving notice until after the 20th of May 1780, lest the money should be paid in depreciated paper. But two years more elapsed, when that danger was over, by the extinguishment of continental money.

It has been said, likewise, that when the drawer has no effects in hand, no notice is necessary; but it has been determined otherwise, as between indorser and indorsee, upon the clearest principles. What is it to the indorsee, whether the drawer has effects or not? Every indorser is in law a new drawer, and he may be compelled to pay a bill, even where the name of the drawer has been forged. Every day's experience shows that bills are taken on the credit of the indorser alone—sometimes, when the drawer is
*272] totally unknown. Nor *can it be alleged, that no injury has been sustained, since, in the course of things, all the prior indorsers might have failed.

Upon the whole, we think, the strength of the evidence is against the plaintiffs; and if the jury are of the same opinion, they will find a verdict accordingly. But if, on the contrary, they are satisfied with the reasons given for not making an earlier demand, they will find for them.(*a*)

The opinion of the COURT being so unfavorable to the plaintiffs, they voluntarily suffered a nonsuit, when the jury were at the bar ready to return their verdict.

In the course of the trial, the plaintiffs offered John Pringle (their immediate preceding indorser) as a witness; and, in order to do away his interest in the action, they proposed striking his name off the first and third bills of the set; which were the only bills in their possession, the second, on which the protest was made, being, as they alleged, lost in its passage from England to America.

It was objected by the defendant, that Pringle's name would still remain upon the second bill (which, for anything that appeared to the contrary, might be in the hands of a third person), and on the records of the notary, who made the protest; so that he could not be effectually discharged in the way proposed.

To this, the plaintiff's counsel replied, that where there are several securities for the same thing, a discharge of one is a discharge of the whole; and they instanced the case of a master of a ship, who usually signs three bills of lading, of the same tenor and date. But—

BY THE COURT.—In that case, if the master takes a receipt, he would certainly be discharged. In the instance before us, however, the second bill may be in the possession of a *bonâ fide* purchaser, who will be entitled to sue Pringle upon it, notwithstanding any act of the plaintiffs on this occasion.

(*a*) See Steinmetz *v.* Currie, *ante*, p. 234, and Robertson *v.* Vogle, p. 252, and the notes to those cases.

We are of opinion, that Pringle is clearly interested in the cause, and therefore, inadmissible as a witness.(*a*)

It was suggested, that if the plaintiffs executed a release to Pringle, he might be made a witness; but *Ingersoll*, doubting whether a release to one indorser would not be a release to all, did not choose to adopt this measure.(*b*)

It was also ruled in this cause, that the case in Term Reports (*Tindall* v. *Brown*, 1 T. R. 68) being a determination upon general mercantile law, was of authority here; and that it would have been so, if it had been determined in France, Spain or Holland, as well as in England.

Mifflin *et al. v.* Bingham.

Deposition.— Witness.

A cross-examination of a witness, under a rule of court, does not preclude the party from taking any legal exceptions, at the trial, to the competency of the witness.

A deposition of a going witness, taken under a rule of court, cannot be read on the trial, unless a *subpœna* has been taken out, and, if possible, served on the witness.

What interest will exclude a witness.

The plaintiffs, being disappointed in their evidence, voluntarily suffered a nonsuit. The following points, however, were resolved in the course of the trial; to illustrate which, it is necessary to relate the leading circumstances of the case. The plaintiffs were *owners of a privateer called [*273 the Rattlesnake, commanded by Captain McCullough. This privateer, having taken a valuable prize, during the late war with Great Britain, carried her into Martinique, where the defendant resided as agent for the United States. At the time of her arrival, the defendant was exceedingly embarrassed on account of certain pecuniary engagements which he had entered into for the public; and, in order to relieve himself, he applied to Captain McCullough for the use of the proceeds of the prize, offering to pay the amount, by bills of exchange drawn on his correspondents in Philadelphia. To this proposal, McCullough agreed; and, on delivering to the defendant the portion of the prize that belonged to the owners, the bills of exchange were drawn, and regularly accepted; but when they became due, they were paid in continental money, which, at that time, had depreciated to the rate of three paper dollars for one hard dollar. The plaintiffs, at first, believing this transaction between McCullough and the defendant, to have been on a public foundation, did not complain of the loss which it occasioned; but settled with the captain and crew for their respective shares of the prize, and allowed the bills of exchange, in McCullough's accounts, as a specie charge. Afterwards, however, it was suggested to them, that the whole was a private speculation for the defendant's emolument; and that no part of their funds, which had been thus transferred to him, was carried into his accounts with the United States. Under this persuasion, they brought the present action to recover the difference between the value of their effects put into the hands

---

(*a*) Cropper *v.* Nelson, 3 W. C. C. 125; Juniata Bank *v.* Browne, 5 S. & R. 226; Sterling *v.* Marietta Co., 11 Id. 179; Zeigler *v.* Gray, 12 Id. 42.

(*b*) See McFadden *v.* Parker, 4 Dall. 275; 3 Yeates 496.

of the defendant, and the depreciated amount of the continental money, in which the bills of exchange were paid—alleging that those effects had been obtained from McCullough under false pretences.

I. The principal witness for the plaintiffs was McCullough, and, in hopes, at all events, to secure his testimony (as he was about to sail on a distant voyage), a rule had been obtained for taking the depositions of going witnesses, upon the usual terms, and subject to all legal exceptions. Under this rule, McCullough was, accordingly, examined by the plaintiffs, and cross-examined by the defendant; and his deposition, thus taken, was offered to be read upon the trial.

But two objections were made: 1st. That McCullough was interested in the event of the cause, and therefore, inadmissible as a witness, even if he were present: and, 2d. That no *subpœna* had issued to procure his personal attendance at the trial.

1. To the first objection, it was answered by the plaintiffs, that it would appear by McCullough's cross-examination, that he, as well as the whole crew, had been fully satisfied for their respective shares of the prize-money, and, consequently, that he was not interested in the fate of this action. It was urged, that the effects delivered to the defendant, were not delivered on McCullough's account, but on the account of the owners of the privateer, as their appropriated part of the prize; that, therefore, having sustained no loss, he would not be entitled to any retribution; and that, in fact, the only ques-

*274] tion *arising from the transaction at Martinique, now lay exclusively between the plaintiffs and the defendant, whether the former should receive from the latter a compensation, equivalent to the loss on the bills of exchange. But it was insisted, that, at all events, this objection came too late, as the defendant had cross-examined McCullough, under the rule; which, having the same effect as if he had been cross-examined in court, when sworn in chief, precluded every subsequent objection to his competency; and that his deposition must indeed be considered, from the nature of the questions asked on the cross-examination, as tantamount to a denial of interest on his *voir dire*. 4 Burr. 2251.

2d. On the second objection, the evidence was, that, though McCullough had left Philadelphia, he had not sailed from Marcus Hook, on the Sunday preceding the day of trial (Wednesday), nor was it certain that he had even yet taken his departure from that place. But it appeared, that the plaintiff, although he had not issued a *subpœna* himself, had given notice to the defendant of the intention of the witness to sail, in order that he might issue a *subpœna*, if he preferred McCullough's *vivâ voce* testimony on the trial, to the deposition under the rule. The plaintiff contended, therefore, that there was no reason to suppose that he wished to avoid McCullough's evidence delivered and canvassed in the most open manner; that the spirit of the rule had been complied with, by putting it into the power of the defendant to secure the personal attendance of the witness; that it would be absurd to require a *subpœna* to be issued in all cases; as, for instance, where the absence of the witness was a matter of notoriety; and that, in the present case, if a *subpœna* had been served, McCullough must either have brought himself into a contempt of the court, by disobeying its process; or have run the risk of ruin, by delaying his voyage.

1. In support of the first objection, the defendant's counsel contended,

that McCullough, being once interested in the proceeds of the prize, it wa not enough to show that he had been satisfied, but the plaintiffs must produce a release. 2 Atk. 15. It was urged, that, in order to perfect every appropriation of joint effects, the consent of both parties is necessary; that in this case, it did not appear that the plaintiffs ever consented to the transaction, and consequently, McCullough still retained the share in the effects delivered to the defendant, to which he was originally entitled as a captain of the privateer. If, then, a recovery takes place in the present action, McCullough may hereafter sue the plaintiffs to compel them to pay over his share of the money recovered; and therefore, his testimony is within the principle of 5 Burr. 2727, where one insurer was declared to be an incompetent witness, in an action on the policy, because he could compel the other insurers to contribute. Nor is the objection too late. Depositions in chancery are always taken *de bene esse.* When McCullough was examined, no court was sitting that could pronounce upon his competency; and the adverse doctrine would involve the defendant in this dilemma, that if he did not examine, he lost all benefit of the testimony, and if he did examine, [*275 *he forfeited all right of exception to the competency of the witness. There is not, therefore, any similitude between a cross-examination under such circumstanees, and the *voir dire*, which is a mere preliminary inquiry; whereas, it appears, that the witness had undergone a long examination on the part of the plaintiffs, before the defendant proposed a single question to him.

2. In support of the second objection, the defendant's counsel referred to the rules of court (tit. Witness, No. 48), and insisted, that these being *literæ scriptæ* to govern the practice of the courts, it was incumbent upon the plaintiffs to prove the service of a *subpœna*, or, at least, a reasonable endeavor to serve it. The greater satisfaction and justice to be obtained from *vivâ voce* testimony, formed the reason of the rule; and this, it was urged, is of such weight, that the common law never admits depositions to be read, but in cases of absolute necessity. If then a *subpœna* had been taken out, a week ago, is there any ground to assert, that the witness, whose family resides here, would not have attended; or that the sailing of the vessel (which may at this moment be anchored within twenty miles of Philadelphia) could not be safely postponed? Where, then, is the absolute necessity to which the common law yields the wholesome rigor of its rules? It is said, that it would have been ruinous to McCullough if he had been detained; but this is a matter of which the plaintiffs had no right to judge; the witness, in the first instance, and the court, eventually, were only competent to determine it; and, after all, the service of a *subpœna* does not compel an attendance, but only requires that a sufficient cause should be shown, why the party did not attend. Suppose, the deposition had not been taken, and the plaintiffs had moved to put off the trial on account of McCullough's absence, would not the court have said then, that they were not entitled to the delay, as the witness was here a few days ago, and they had not pursued any legal steps to obtain his evidence? Is there not as much propriety in saying so now?—for it is idle to rely upon the notice of McCullough's intention to sail, since the plaintiffs had the same opportunity of detaining the witness which was given to the defendant; and the latter would have been

absurdly officious, indeed, if he had taken it upon him to *subpœna* his adversary's witness.

McKean, Chief Justice.—There are two ways of proving a witness to be interested in a cause—first, by examining him on his *voir dire;* or, secondly, by showing his interest from other evidence, either parol or written. But both these ways cannot be pursued at the same time; for the election of the one conclusively bars any subsequent recourse to the other.(*a*) The defendant's cross-examination under the rule in this case, is not, however, upon the same footing with an examination upon the *voir dire;* and therefore, we do not think that he is now precluded from the advantage of any legal exception to the competency of the witness.

*276] *With respect to the admission of testimony, the law has been so well established, and is so perfectly understood, that it needless to enter minutely into the doctrine. The whole, indeed, may be reduced to a short rule; if the witness speaks under an *interest*, it is fatal to his competency; if he is liable to an *influence*, it taints his credibility. On the present occasion, we are of opinion, that Captain McCullough, at the time of taking the deposition, was not an interested witness; and therefore, if there was no other objection, we should certainly allow the plaintiffs the benefit of his testimony: for, in the authority cited from Atk. 15, Lord Hardwicke can only mean, that a witness, who has been once interested, shall be presumed to be so still, unless the contrary is proved by a release, or other satisfactory evidence.

The plaintiffs, however, have failed in another respect. A *subpœna* ought certainly to have been taken out, and, if possible, served upon the witness; for, it was his, and not their province, to determine whether he would attend or not. The rule never was meant, indeed, to direct an useless thing—such as issuing a *subpœna* for a witness actually residing in London, or any other distant country; though even this was heretofore required, in strict practice. But, in the present instance, Captain McCullough was known to be here, a few days ago, his family always resides here, and he may himself, probably, be within a very short distance of the city at this moment. The plaintiffs having taken it upon themselves, not only to decide for the witness, that he would not attend, but also for the court, that they would not insist upon the rule, have acted in their own wrong; and, upon this objection, we are of opinion, that the deposition ought not to be read in evidence.(*b*)

II. The defendant's counsel offered his books to prove, that in his account

---

(*a*) See Vincent *v.* Huff, 4 S. & R. 298; Shannon *v.* Commonwealth, 8 Id. 444; Davis *v.* Barr, 9 Id. 138; Evans *v.* Eaton, Peters C. C. 338.

(*b*) s. p. Wallace *v.* Mease, 4 Yeates 520. And it has been held, that if the party who takes the deposition does not choose to read it at the trial, it cannot be read by the opposite party, without complying with the rule as to subpœnaing the witness; Gordon *v.* Little, 8 S. & R. 583. But where the witness resides out of the jurisdiction of the court, his deposition may be read, without a subpœna having been taken out. Ranken *v.* Cooper, 2 Bro. 13: and see Parker *v.* Farr, 1 Id. 252. As to the practice of the circuit court of the United States, in this respect, see Browne *v.* Galloway, Peters C. C. 294; Penns *v.* Ingham, 2 W. C. C. 487; Banert *v.* Day, 3 Id. 243.

with the United States, at the time of the transaction between him and McCullough, there was a considerable balance in his favor.

But it was objected, for the plaintiffs, that the books of a party are only evidence of goods sold and delivered, or work done; and that, therefore, they were inadmissible to the present purpose, which was to show that the money was advanced upon a contract different from that which the plaintiffs alleged.

To this, it was answered that although the books of a party are only evidence to charge in the cases mentioned, yet, that they might well be received to establish a matter collateral to the cause.

And by McKean, Chief Justice.—This is a point, that I do not remember to have ever occurred before. The books are not offered to prove a charge against the plaintiffs, but only to determine a collateral question, whether a third person was the defendant's debtor, at a particular period. How can this be accomplished, but by the evidence of the books, fairly and regularly kept? To make it a charge, other vouchers of the entry might be necessary; but for *this purpose, if it is of any importance to the cause [*277
(which I do not think), I can conceive no other mode of proceeding.

The defendant, thinking, however, that he could accomplish his object in another way, did not call for a decision of the court; but waived the reading of the books.(*a*)

For the plaintiffs, *Ingersoll* and *Sergeant*. For the defendant, *Tilghman Lewis* and *Wilson*.

(*a*) In the Juniata Bank *v.* Brown, 5 S. & R. 226; it was held, that in an action between A. & B., the books of original entries of C. were not evidence, to show a collateral fact; as that A. was charged by C. as a partner in a certain firm.

HIGH COURT OF ERRORS AND APPEALS OF PENNSYLVANIA.

APRIL SESSIONS, 1788.

LEWIS, appellant, *v.* MARIS, appellee.

Probate of will.

A will, not written by the testator, nor subscribed by him, but proved by *one* witness only, to have been put in writing according to his direction, is not admissible to probate, under the act of 1705.

THIS was an appeal from the decree of the register of wills, and two justices of the court of common pleas of the county of Montgomery, who admitted an instrument, bearing date the 25th of the tenth month, 1786, purporting to be the last will and testament of one Jephtha Lewis, the father of the appellant, to be proved as a good will and testament in writing, although it had neither been written nor subscribed by the supposed testator; upon the deposition of John Evans, a scrivener, that it was drawn at his request, and conformable to his instructions, but never read to him, after it was written. This instrument contained a devise of real estate, and a legacy of 400*l.* for the use of a school, in the township of Gwyned, and county of Montgomery; and upon the validity of that legacy, the present controversy arose. It was proved by several persons, that the deceased, in the year 1784, had talked of leaving money to a school; that about three months before his death, he asked one of the deponents to be a trustee for that purpose; that some months before his death, he remarked to another, what better could a man do with his money than to leave it to such a use? that he declared he did not intend all his estate for his child; that he spoke repeatedly of John Evans's making his will; that for fear it should come to the knowledge of his family, he desired it to be left with John Evans; that being indisposed, when it was drawn, he desired John Evans to call upon him again with it; that when John Evans called with it again, he was too far gone to read and attend to it; and that the disposition of the real estate contained in the paper produced, was the same which the deceased had, before his death, desired *his brother to mention to John Evans: but John Evans was the only witness who proved any instructions to have been given in respect to the *legacy* of 400*l.* It appeared, likewise, that the same scrivener had drawn another will for the deceased, in the year

*279]

1779, which was left in similar circumstances, without the subscription of the testator, or any other attestation than that of the drawer; but this circumstance was made no use of in the argument.

Wilcox and *W. M. Smith*, for the appellants. We contend, 1st. That there is only one witness to prove the instrument in question; and, 2d. That two witnesses are indispensably necessary to the legal establishment of a last will and testament.

I. The first point arising from the facts, must be determined by the depositions; and, as no regard can be paid to a recital of the loose expressions which were used by the supposed testator, antecedent to the instructions for drawing his will, it is clear, that the only evidence to support the legacy in favor of the school, must be founded upon the deposition of John Evans, to whom those instructions were given.

II. We shall proceed, then, to consider the second point, which depends upon the construction of the act of assembly, passed in the year 1705, "concerning the probates of written and nuncupative wills, and for confirming devises of land." It is there said, "that all wills in writing, wherein or whereby, any lands, tenements or hereditaments, within this province, have been, are, or shall be devised (being proved by two or more credible witnesses, upon their solemn affirmation, or by other legal proof in this province, &c.), shall be good and available in law, for the granting, conveying and assuring of the lands or hereditaments, thereby given or devised, as well as of the goods and chattels thereby bequeathed." (1 Sm. L. 33.) The question, therefore, rests upon the meaning of the words, *or other legal proof in this province;* and, in order to ascertain that, it may be proper to take a short, retrospective view of the general doctrine, respecting the legal attestation of wills and testaments. As the probate of wills was not a matter originally of common-law jurisdiction, the decisions have necessarily been drawn from the civil law, the ecclesiastical law, and the law of nations, engrafted upon the general customs of the realm of England. By the civil law, indeed, seven witnesses were required; but this excess being reformed, first, by the ecclesiastical law, which required three witnesses in some cases, and only two in others, and then, by the general customs of the kingdom, it is settled, in the most authoritative books, to be sufficient, that the will and mind of the testator should appear by two competent and disinterested witnesses. Swinb. 5, 6, 45, 46; 3 Salk. 396. For, the general customs of the kingdom are not further controlled, than by the *jus gentium*, which is likewise satisfied with the attestation of two witnesses; Swinb. 47; God. Orph. Leg. 3, 8, 10; and where, indeed, the disposition is for *pious uses*, the canon law, in this respect, corresponds with the *jus gentium*, although for secular purposes, it still requires *two witnesses, one of whom must be the minister. God. Orph. Leg. 8, 10. In the case of codicils, the civil law required only five witnesses, but the law of England requires the same proof, as in the case of testaments, that is, two witnesses. Id. 20. Two witnesses, therefore, are sufficient, and regularly two witnesses are also necessary to the legal proof of a last will and testament; Swinb. 343; 1 Equity Abr. 5; Bac. tit. Test.; and it may be vain to have no more than one. Swinb. 65. Where children have been considered as incompetent witnesses to their father's will, a child, being the third witness, was adjudged as none, [*280

and the will set aside (1 P. Wms. 10, s. p., 267); and the necessity of two witnesses to a will, is an idea as ancient as the time of Glanvil. Glan. lib. 7, c. 5. Nor does a prohibition lie to the ecclesiastical court, for refusing, by one witness, to establish a testamentary writing. God. Orph. Leg. 66; 2 Burn. Ecc. Law, 243; 2 Salk. 547; Ld. Raym. 220. It is certain, that the statute of frauds has not made any alteration in respect to written testaments of goods and chattels; and one witness, by the civil law, being as no witness at all, the proof of such a testament can only be made by two sufficient witnesses. 2 Burn. Ecc. Law. 524.

It is true, that we have produced no adjudged case, under the 32 *Hen. VIII.*, c. 1, showing that two witnesses are necessary to establish a will of real estate; but we have cited so many authorities of a date subsequent to the statute, which, in this point, make no discrimination between wills of lands and testaments of chattels, that it may be fairly inferred, that the rule of proof, founded upon the *jus gentium* and the general customs of England, is alike applicable to every species of testamentary writing. For the cause of the appellant, however, it is sufficient, that no doubt can remain of its strict and invariable application, in the case of testaments for the disposition of personal property; and, being thus incontrovertibly established in that country, from which we have, in general, copied the principles and practice of jurisprudence, it will appear by various acts of the legislature, antecedent to the passing of the law in question, and even by the original stipulations in England, that the necessity of two witnesses to the legal probate of a last will and testament, has been expressly recognised and adopted in Pennsylvania. Thus, among the laws agreed upon in England, it is provided, that "all wills and writings, attested by two witnesses, shall be of the same force as to lands, as other conveyances, &c." Prov. Laws, in app. p. 4, art. 15 From which, it seems to have been the intention of the Proprietary and first emigrants, to obviate every doubt, and, unequivocally, to place the proof of wills of lands, upon the same footing with the proof of testaments of chattels; and this stipulation was formally enacted into a law, soon after the meeting of the general assembly of the Province. Id. p. 7, c. 45. The law enabling foreigners to devise lands, likewise makes two witnesses necessary

*281] to the will. Prov. Laws, vol. 2, p. 109, old edit.(*a*) Nay, the *legislature, at that day, carried the matter so far as to require the testimony of two witnesses in all cases. Prov. Laws, in app. p. 3, c. 36. Is it not, therefore, unreasonable to suppose, that it was intended, by the act of 1705, to relax the rules of proof on a subject of so much solemnity and importance, as a last will and testament? And, more especially, when by the same law, § 6, it is declared, that no will in writing, concerning any goods and chattels, or personal estate, shall be repealed by word of mouth only, nor shall any nuncupative will be established, but upon the testimony of two or more witnesses? § 3.

This act then must have proceeded upon the well-known principles and decisions respecting probates; and the construction ought to be such, that no word should be rendered void, superfluous or insignificant. Hence, by the words, *or other legal proof*, the proof meant by the legislature, must be

(*a*) This act of assembly requires two or more subscribing witnesses.

that, which the pre-existing laws and customs of England, had made necessary to a last will and testament, and not merely that, which is sufficient to convict a man of an offence, or to charge him with a debt; for, if this were not the meaning, it would be superfluous to say, that the probate shall be by two or more credible witnesses, upon their solemn affirmation, or by other legal proof, since the latter sentence would naturally comprehend and supersede the former. Such, indeed, has been the interpretation of the register's court of Pennsylvania, previously to the revolution, by the decree of a gentleman of great professional abilities. *William West's case*, before the Register-General of Pennsylvania, in 1773.

But, when we consider the religious delicacy of those persons, who chiefly composed the legislative body when the act was passed, may we not presume that this mode of expression has been used, in order, on the one hand, to assert the right of giving testimony upon solemn affirmation; and on the other, to avoid the direct mention of testimony upon oath? This conjecture is, in some degree, supported by the circuitous manner in which many other acts of assembly prescribe the forms of proof; Prov. Law, 2, 3, 4, 5, 6, 20, 24, 25, 37, 42, 45; for, the first time that an attestation upon oath is expressly mentioned, occurs in the year 1715, ten years after the passing of the law in question. Id. 76. (1 Sm. L. 94.)

If, then, laws which relate to the same subject, must be taken together, there can be no doubt, from a connected view of the laws of England, the acts of assembly cited from the appendix of the late province laws, the different parts of the very act in question, and the practice of our courts, that, whether qualified by affirmation, or by oath, two witnesses are necessary to establish a last will and testament, and without *two* there can be no legal proof. The witnesses, we admit, need not be present at the actual execution of the instrument: but, if it is written by the testator himself, two witnesses must, at least, prove his handwriting; and if it be written by another person, two witnesses must prove that it contains his last will and disposition.

**Lewis* and *Lawrence*, for the appellee. The appellant, in contravention of his father's wishes and benevolence, endeavors to set [*282 aside the will, in order to defeat the charitable donation which it contains: Should there be a doubt, therefore, upon the subject, it will operate against so ungracious an attempt; but we conceive that the strict principles of law will be a sufficient prevention. Before the statute of wills, 32 *Hen. VIII.*, *c.* 1, every man was at liberty to dispose of his personal estate; and as the disposition was, in that respect, governed by the civil and ecclesiastical laws, according to their institutions, two witnesses were necessary to the probate of every testament.

But when a statute, without saying anything about the proof, gives a new power to devise, unknown in the civil and ecclesiastical codes, shall we resort to them, instead of the common law, to ascertain, in what form, and by what number of witnesses, the exercise of that power ought to be attested? This would surely be an absurd and improper deviation, since the courts of civil and ecclesiastical law can only interpose with respect to testaments of chattels, and cannot take cognisance of wills for the conveyance of lands. It may, indeed, seem strange, that two witnesses should ever have been requisite to the former, and only one to the latter: but they are

matters not regulated by the same legislature ; so that when the parliament, authorizing a devise, requires two witnesses to prove it, this is not done because, in similar cases, the civil law requires a similar attestation, but on account of the fitness and expediency of the thing itself.

It is true, however, that, as on the other side it has not been shown that two witnesses are necessary, neither have we been able to discover a case, in which it is expressly adjudged, that, under the statute of 32 *Hen. VIII.*, *c.* 1, one witness is sufficient to establish a will of lands ; but, as all the authorities and abridgments that have been produced, refer exclusively to the case of a testament of chattels, and are uniformly silent with respect to the disposition of real estate, it is evident, that the writers regarded the separate jurisdictions to which these testamentary instruments respectively belonged, and were aware of the different degrees of proof, upon which their authenticity depended. Besides the cases that have been already cited for the appellant (which merely state, with some variations, that a notary having received instructions for drawing a will, and having accordingly drawn it, did not arrive until the party was dead), there are many others of a similar description. Vin. tit. Devise, p. 117, pl. 2, 4, 5, 6, 14, 15; p. 123, pl. 9; p. 122, pl. 3. But, in this long catalogue, not a word is said to show, that two witnesses were present at the execution of the will, or heard the instructions which were given for drawing it. Nay, in an action brought by an heir-at-law against a devisee, we find that the instructions for drawing the will were given to an individual, and there is not the least intimation of another witness being present at any part of the transaction. Swinb. 56. Thus likewise, when a man desired another to write *his will, who accordingly took short notes at the time, went home, and reduced them into form, but did not return, until the testator was dead, this nevertheless was adjudged to be a good will within the statute, Swinb. 6 ; and even where the notes were not reduced to form, until after the testator's death, the will was established. Swinb. 51, 56, 113 ; Cro. Eliz. 100. For the principle is explicitly laid down in Blackstone, that "as to written wills, they need not any witness of their publication, &c. A testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good : and though written in another man's hand, and never signed by the testator, yet, if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate." 2 Black. Com. 501.

*283]

The cases that are regulated by the statute of frauds, 29 *Car. II.*, *c.* 3, are clearly of no authority here ; but those which have been determined under the statute of 32 *Hen. VIII.*, *c.* 1, are applicable to the act of assembly, and ought to govern in the exposition. By this statute, no proof of signing and attesting is prescribed, and therefore, before the passing of the act in question, though two witnesses were necessary to prove a testament of chattels, one was sufficient, in Pennsylvania, to establish a will of lands. What, then, is the change introduced by the legislature ? In the constructions of statutes, every part must receive effect ; for, it cannot be presumed that unnecessary words have been used ; Cowp. 558 : and, in order to give effect to every part, it is natural to inquire what was the subject under consideration, and what were the objects and intentions of those who framed the law? When, therefore, the legislature was considering by what

proof wills and testaments ought to be established, we may reasonably presume, that they took into contemplation the general principles of evidence, and finding that presumptive proof, or in other words, such circumstantial testimony as satisfied the mind, was sufficient in every other instance, whether on a question of property or of life, might they not ask, why it should be rejected here? and, if a competent answer were wanting (as it certainly must be), would they not wisely resolve to destroy a distinction, for which there exists no solid foundation in reason, or the nature of things? The legislature, then, not implicitly adhering to the civil or ecclesiastical institutions, and placing the probate of wills of lands, and of testaments of chattels, upon the same footing, have, in effect, declared that those instruments shall, if possible, be authenticated by two or more credible witnesses, on their solemn affirmation; but, if this cannot be obtained, then, that other legal proof, or the same circumstantial and corroborative evidence which decides the other most important interests of men, shall, in this case, likewise be received.

Such, we contend, was the intention of the legislature; and what constitutes legal proof, it is incontrovertibly the province of the common law, and not of the civil law, to judge and determine. Let us suppose, that a man directs his will to be drawn, that it is executed *in the presence of the drawer, that the testator informs his friends by whom it was drawn, and that, accordingly, after his death, it is found in the handwriting of that person—under these circumstances, the confession of the party, corresponding with the testimony of the scrivener, and corroborated by the handwriting, would certainly amount to legal proof, at common law; but, pursuant to the adverse doctrine, the will could not be established, for there are not two witnesses to the execution, nor to the instructions for drawing it. Again, if a man says "my will is in a certain drawer," and, after his death, an instrument, purporting to be his will, is found in that drawer; this, likewise, would be deemed legal proof, and yet it wants the attestation of two witnesses. Or, suppose it had been said, "I am going to my notary to direct him to draw my will, and I mean to give half my estate to A., and the other half to B.;" if, after his death, the notary produced an instrument drawn in that manner, the circumstances of the case would furnish a legal proof, but still there are not two witnesses to the will. [*284

If two witnesses are required in all cases, the act must be taken to intend witnesses present at the execution of the will; and so the expression "or other legal proof," becomes insignificant and nugatory. Nor, consistently with the rules of grammar and construction, can the argument be admitted, which is founded upon the religious scruples of the assembly that passed the act; for, if the legislature sought to avoid the mention of an oath, the sentence must have been differently arranged, and would probably have run in this way: "wills, &c., being proved on the solemn affirmation, or other legal proof, of two or more credible witnesses," &c.; but, as it now stand, the appellant's interpretation is strained and improbable; while the latitude for which we contend, is not without precedent; for, by the statute of *James I.*, the mother of a dead child, which, if it had lived, would have been a bastard, is required to give positive proof, by one witness at least, that it was born dead, or she shall suffer as in the case of murder; yet, in trials under this law, circumstantial evidence has always been admitted here,

as well as in England, to work an acquttal. This is, indeed, a penal statute; but there is nothing which the law regards more favorably than a last will, and judges have ever been solicitous to support the intention of the testator.

Is there not sufficient evidence, then, that the will in dispute, contains the intention of the testator? Every part of it, except that which relates to the legacy of 400*l.*, is directly proved by two witnesses, the scrivener who drew it, and the testator's brother who carried the instructions; and, even with respect to the legacy, there is the positive testimony of one witness, corroborated with such circumstances as force conviction on the mind—such circumstances as ought, we say, to be received under the act of assembly. The testator, avowing that he did not mean to leave all his estate to his children, had for years before his death uniformly declared his intention of bequeathing a legacy for the benefit of a school; and, but a few days before he expired, he requested one of the witnesses to be a *285] *trustee for that use. When, therefore, we find the same intention expressed in the instrument produced, and the scrivener deposes that it is expressed conformable to the instructions he received, there cannot be a doubt of our being in full possession of the last will and mind of the testator. The will is, therefore, clearly established by legal proof, within the letter and spirit of the act; which, by thus using a comprehensive though plain and satisfactory mode of expression, intended to obviate the many mischiefs that had arisen, from the strict rules of proof required by the civil and ecclesiastical law.

Wilcocks, in reply.—It is conceded, that, according to the law in England, a testament of chattels must be proved by two witnesses; but it is argued by the adverse counsel, that under the statute of 32 *Hen. VIII.*, *c.* 1, a will of lands is sufficiently proved by one witness. In this, we cannot agree; for none of the cases, cited on the part of the appellee, relate to the solemnities of making a will, or the degree of proof that is required; the only point agitated or determined in any one of them, is, whether the instrument in question be a good will in writing, or not? and though there is no express adjudication upon the subject, we find it said, that two witnesses are necessary to a will, saving that, in case of land, the solemnity of writing is also necessary, Swinb. 6; which is a strong implication in favor of the appellant's doctrine.

But the present controversy must be decided, after all, by the act of assembly, which was made with a full knowledge of the ideas and determinations in England, relative to the probate of testamentary writings; and there appears from the several acts of the legislature of Pennsylvania, a fixed intention to adopt the practice of that country. If, indeed, by the words, or other legal proof, less than two witnesses were meant, this absurdity will be obvious, that in the first part of the sentence, we are called upon to prove the will, by two, or more, credible witnesses, upon their solemn affirmation; and that in the close of it, we are allowed to make the proof by one, or less than one, witness, that is, by circumstances which satisfy the mind; so that the words, "two or more witnesses," are, by such construction, satisfied by a proof of "two, or less than two, witnesses." Thus, likewise, the testimony of two witnesses, or of *less than two*, under

any circumstances, is made tantamount to the testimony of *two or more witnesses, upon their solemn affirmation:* a concession which, it is not probable, a legislature, composed of Quakers, would have been easily induced to make. On the contrary, the design of this clause seems to have been, to prevent any doubt of a man's right to deliver his testimony, conformable to the dictates of his conscientious scruples; and, having provided that the proof might be made by two or more credible witnesses, upon their solemn affirmation, it was necessary to proceed to admit other legal proofs; for, if the legislature had stopped there, an affirmation would be the only form of attestation by which a will could be established; and, as the law allowed no person to affirm, who was not conscientiously scrupulous *of taking an oath, it follows, generally, that none but a Quaker could be a witness to a will. [*286

Certain it is, therefore, that *other legal proof* is placed in opposition to *solemn affirmation*, and not to the number of witnesses; and the clause, fairly construed, amounts to this, that "wills, &c., being proved by two or more credible witnesses, *upon their solemn affirmation*, or by two or more credible witnesses, *under any other legal qualification*, shall be good and available in law"—the same number of witnesses being necessary to the probate, whatever may be the form of attestation.

This construction is perfectly conformable to the caution and to the liberal principles of the legislatnre of that day. They first take care to establish a mode of proof according to their own religious persuasion, and then, under the general expression, "other legal proof," would admit all modes of attestation, which either the laws of that day, or any future time, should recognise.

Without such precautions, how precarious would be the situation of property! In the last moments of life, when the body is depressed with sickness, the understanding impaired by age, and the mind agitated with doubt and apprehension, we may easily conceive the successful operations of artifice and fraud. The government of every wise and enlightened nation has endeavored, therefore, to protect the imbecility and weakness of that state, from the force or cunning of interested men: nor is it just to the reputation of this country, to suppose, that her legislature alone has left the proof of the last, and most solemn, act of her citizens, to mere circumstances and conjecture.

The court took time to consider of their judgment, which was, the next day, delivered by the Chief Justice.

McKean, Chief Justice.—This cause comes before us upon an appeal from the register of wills, and two justices of the court of common pleas, of the county of Montgomery; and it is agreed, that there is but one question for the determination of the court; to wit, whether a will, not written by the testator, nor subscribed by him, but put into writing by his direction, and proved to be so only by the person who drew it, ought to be established as a good and perfect will and testament?

The disposition of property by will, was certainly the first mode of conveyance used among men; and some authors, in tracing its antiquity, have informed us, that Noah made a will, devising the whole world to his sons, according to their respective proportions. The convenience of the thing

having rendered it universal, custom, at length, became a law for its support; and different solemnities or forms were prescribed by different legislatures, in order to fix the authenticity of a testamentary writing. Thus, by the Roman law, it was originally requisite that a will should be in writing, subscribed by the testator, if he could write, *before seven witnesses, *287] and if he could not write, then published by him in the presence of eight witnesses; but this number was properly reduced to two, in the time of Justinian. By the civil and ecclesiastical laws, as they prevail in England, the ablest writers concur in saying, that two witnesses are required, and that two are sufficient to prove a will. The statute of 32 *Hen. VIII.*, *c.* 1 (which is merely explained by the 34 & 35 of the same reign), enables a man, by his will in writing, to dispose of all his socage lands, and two-thirds of his lands held *in capite;* which, by the subsequent operation of the 12 *Car. II.*, *c.* 24, extends to all his real estate. It is incontrovertibly settled, however, that neither the statute of *Henry VIII.*, nor the statutes by which it is explained, made any alteration in respect to testaments of goods and chattels; and therefore, they are still regulated, as they always were, by the civil and ecclesiastical law, which, as it has been already remarked, requires the attestation of two witnesses.

As this, then, was the established rule in England, and as by the charter from Charles the Second to William Penn, the laws of England relating to property, were to be the laws of the province, until altered by the legislature of Pennsylvania, we must now inquire, whether any act of our legislature has substituted another mode of proof?

It is contended, on the part of the appellees, that the law enacted in the year 1705, has placed wills of real estate, and testaments of personal property, upon the same footing; and that any proof which would be sufficient to convince a jury of a fact in issue, is, by that law, made competent to the probate of a last will and testament. It has been argued, likewise, by the same counsel, that, even in England, from the passing of the statute of 32 *Hen. VIII.*, *c.* 1, until the passing of the statute of frauds, 29 *Car. II.*, *c.* 3, the positive testimony of witnesses was not required, but that any common-law evidence, founded upon circumstances, was sufficient to prove a will of lands. On this point, there is, perhaps, no *express* adjudication to be met with in our books; yet there are cases in which the necessity of two witnesses to a will of lands, seems strongly to be implied. God. Orph. Leg. 15; Dyer 72; Plowd. 345. But the cause before the court must finally depend upon a proper construction of the act of assembly; which has declared, that "wills, &c., being proved by two or more credible witnesses, on their solemn affirmation, or by other legal proof, shall be good and available in law;" and as all testamentary writings, whether for the disposal of real or personal estate, are subject, in this respect, to one rule, the whole dispute rests upon the words, *or other legal proof.*

In the construction of statutes, the same principle should be observed, which prevails with respect to wills; and the intent and meaning of the legislature in the former, ought to be as carefully sought after, and as faithfully pursued, as the intent and meaning of the testator, in the latter. What then was the intention of the assembly in passing this act? The appellees allege, that it was to admit common-law evidence in the case of wills; *288] and that *other *legal proof* is an alternative, opposed to the num

ber of witnesses. But to this, it has been answered, that less proof than two witnesses could not, consistently with the reason and nature of the subject, be intended; and that *other legal proof* is put in opposition to *solemn affirmation*, in order to admit the attestation of an *oath*—whether administered upon the Gospels to a Christian, or upon the Pentateuch, to a Jew; whether with the solemnity of an uplifted hand, according to some sectaries; or with the ceremonial of the hand placed beneath the thigh, as it is practiced by the Gentoo nations.

This appears, upon the whole, to be the genuine exposition of the act; and the adverse doctrine is pregnant with so much absurdity and inconvenience, that it ought not to be imputed to the legislature, nor ought it to receive the sanction of the court. Besides, we find, that this very act requires the testimony of two or more witnesses to the probate of a nuncupative will, and likewise to the revocation of a will; and every principle which could make it necessary in those instances, must, *à fortiori*, operate in the case before us: For, it could not be designed, that greater solemnity should be observed in a *verbal* testament, or in *repealing*, than in *making*, a last will and testament—an act of the most serious and important nature, not only as it affects the testator, but as it affects the peace and welfare of posterity.

In short, from the uniform tenor of the acts of assembly, from the practice of the courts, and from the other analogous sections of the same law, it is evident, that the legislature meant to require two witnesses, in proof of every testamentary writing, whether for the disposition of real or personal estate. This opinion, in which the court unanimously concur, we are happy to deliver; for, it would be dangerous indeed, were the idea tolerated for a moment, that a notary, or any individual, could alone, according to the opposite construction, prove the validity of the will which he had written. By such means the very purpose of wills might be defeated, and the fullest scope given to foul and fraudulent impositions.

Bryan, Justice.—The witness, on the present occasion, is indubitably a man of fair and upright character, and therefore, it is the more particularly to be observed, that the opinion of the court is founded upon the indispensable necessity of having two witnesses to the probate of every will.

By the Court.—Let the sentence and proceedings of the Register's Court be reversed.(*a*)

(*a*) In Eyster *v.* Young, 3 Yeates 511, the principal witness proved that he made notes from the instructions of the testator, which were read over to him, and afterwards put into form, and the will thus made was in part read to the testator, who became insensible, before the reading was finished. Two other witnesses proved that they were present when the instructions were given, and together confirmed the testimony of the first. This was ruled to be sufficient to establish the will; the court saying, "circumstances may supply the want of one witness, where they go directly to the immediate act of disposition."

In Hock *v.* Hock, 6 S. & R. 47, it is laid down by Judge Gibson, in delivering the opinion of the court, that "each of the witnesses must separately depose to all facts necessary to complete the chain of evidence so that no link in it may depend in the credibility of but one. . . . . Circumstantial proof cannot be made by two or more witnesses,

KIRKBRIDE *et al.*, Plaintiffs in error, *v.* DURDEN.

Warrant of attorney.

It seems, that a warrant of attorney, to confess judgment in the court of *common pleas* for the county of *Bucks*, or "any other court," will authorize a confession in the supreme court.

Under the act of 1786, judgment cannot be entered in the supreme court, in pursuance of a warrant of attorney, given with a bond, bearing date prior to the passing of the act.

A judgment entered in the supreme court, since the act of 1786, as of the county of *Bucks*, is erroneous.

THE plaintiffs in error had executed a bond, bearing date the 23d of October 1784, to the defendant, with a warrant to confess judgment thereon, directed "To Wm. Lewis, attorney of the court of common pleas, at Newtown, in the county of Bucks, or to *any other attorney of *any other court;*" and at the same time, executed a mortgage of lands in the same county, as a collateral security. The judgment was entered in the supreme court, as of Bucks county, of September Term 1787, whereupon, a writ of error was sued out, in order to set the judgment aside, and the following errors assigned:

*289]

1. That the judgment was entered in the supreme court for a debt which arose *before* the passing of the act of assembly, that gave original jurisdiction to the supreme court, in the county of Philadelphia.

2. That the warrant of attorney did not authorize the entering up the judgment in the supreme court: and

3. The general errors.

To which, *in nullo est erratum* was pleaded.

Swift, for the plaintiff in error, argued: I. That the supreme court never had original jurisdiction, until the late law; for, the act by which it was instituted, gives only an *appellate* jurisdiction: 1 State Laws, 114, 115, § 11. And that it was evidently the intention of the legislature to confine, even the exercise of that power to suits exceeding 50*l.* Id. 338-9, § 4. He insisted, that the act of assembly giving the original jurisdiction, likewise furnished

---

alternating with each other as to the different parts of the aggregate of circumstances, which are to make up the necessary sum of proof; the evidence of each not going to the whole." And see Hight *v.* Wilson, *ante*, p. 94, and the cases there cited.[1]

[1] The act of 3d April 1833, § 6 (P. L. 249), provides, that, "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him, at the end thereof, or by some person in his presence, and by his express directions; and in all cases, shall be proved by the oaths or affirmations of two or more credible witnesses, otherwise, such will shall be of no effect." That the testator was prevented from signing, by the extremity of his last sickness, must be proved by the witnesses. Grabill *v.* Barr, 5 Penn. St. 441; Greenough *v.* Greenough, 11 Id. 489; Barr *v.* Graybill, 13 Id. 396; Snyder *v.* Bull, 17 Id. 54, 60. And the extremity of the sickness must be such, as not only to render the party incapable of signing, but also of directing it to be done, by another for him. Ruoff's Appeal, 26 Penn. St. 219; Thomas *v.* Thomas, 27 Id. 485. The testator's hand, however, may be steadied by another, in the act of signing. Vandruff *v.* Rinehart, 29 Penn. St. 232; Cozzens' Will, 61 Id. 196. The act of 27th January 1848 (P. L. 16), authorizes the execution of a will by the testator making his mark. And a will may be so executed though he be able to sign his name. Main *v.* Ryder, 84 Penn. St. 217. In such case, the addition of a wrong name will not vitiate the execution. Long *v.* Zook, 13 Penn. St. 400. A will written and signed, in lead pencil, may be admitted to probate. Myers *v.* Vanderbilt, 54 Penn. St. 510. But not, it seems, a will written on a slate. Reed *v.* Woodward, 11 Phila. 541.

a satisfactory inference, that the court did not previously possess it; but that, at all events, after that act was passed, no action, for any antecedent debt or cause, could be brought in the supreme court; nor even for debts arising after that act was passed, in any other county than Philadelphia. 4 State Laws, 154, § 4, 5.

II. On the second error, he stated, that, as it was an error in fact, the defendant's plea had allowed it; for, if the plaintiff assigned error in fact, and error in law, the defendant ought to join issue as to the fact, and plead *in nullo est erratum* as to the matter of law; but if he pleads *in nullo est erratum* only, he admits the facts, and the judgment must be reversed. 2 Bac. Abr. 218.(*a*) He waived this advantage, however, and contended, that the warrant, authorizing any attorney to enter up the judgment in the court of common pleas of Bucks county, could not be extended to authorize the entering it up in the supreme court; for, where an *inferior* thing is mentioned, a *superior* cannot be intended; 2 Co. 46; and such has been the uniform determination of the judges. 2 Inst. 457-8. The warrant of attorney gives a bare authority, which ought to be strictly pursued; and, though directed to any attorney of any other court, this cannot be taken to mean of a *superior* court, but only courts of equal and concurrent jurisdiction. Nor can the jurisdiction be given by consent (which he said, however, was not the present case), for common recoveries are certainly actions by consent, and yet it was necessary that a law should expressly vest in the supreme court a power to entertain them. (1 Sm. Laws, 203.) But the intention of the parties appears by the mortgage, as well as by the court specified in the warrant, to have been to bind only the estate in Bucks county whereas, by entering up the judgment in the supreme court, *a lien is obtained upon the lands of the plaintiff in error, throughout the state.[1] [*290

Wilcocks, for the defendant in error, admitted: I. That it had been long a question, whether the supreme court had original jurisdiction before the passing of the late law; but, even resolving that point in the negative, he contended, that the court might receive and sustain a cause, under the peculiar circumstances of the present case. For, being an action of debt, it was, in its nature, cognisable there, and no law prevented the parties from confessing judgment, by consent, without the trouble and expense of an original. This was not, therefore, to be construed into an exercise of original jurisdiction; but merely a passive acquiescence in the agreement of the parties, to enter a judgment upon the records of the court. Such, he said, had been the old and constant practice in Pennsylvania, both before and since the revolution, as well with respect to the confession of judgments, as to the entering of amicable actions; and if the matter were to be traced, the titles of many real estates would be found to depend upon its legality—so that the greatest disorder and uncertainty would be introduced, by a contrary determination, at this time. If, then, it was never doubted, that the court had a

---

(*a*) s. p. Sliver *v.* Shelback, *ante*, p. 165; Moore *v.* McEwen, 5 S. & R. 373.

[1] See act 20th March 1799, § 14 (3 Sm. Laws, 358), restraining the lien of judgments entered in the supreme court to the counties in which they are entered. And see Provost *v.* Gorrell, 5 W. N. C. 151, as to the lien of judgments in the circuit court of the United States.

sufficient authority to compel the parties to perform an agreement, *à fortiori*, they may compel the performance, when the agreement is made with the solemnities of a warrant of attorney, and under circumstances which would otherwise be attended with the most pernicious consequences.

II. With respect to the second error, he said, that, if it were necessary, the court would permit him to alter his plea; but as it had been agreed to discuss the validity of the warrant of attorney on the present issue, he should contend, that the cases cited did not support the objection. He admitted, that when an act of parliament entered into an exact enumeration, and it appeared from the subject, that nothing more was intended, than what was expressed, there the rule prevailed, and a recapitulation of *inferior* things could not, by implication, affect things of a *superior* nature. But when an act contains general and comprehensive words, which indicate an intention to embrace a higher object, he insisted, that the spirit and meaning of the law, was not to be fettered by the mode of expression. This controversy, however, he distinguished from the case of statutes; for, he said, it did not arise on the construction of an act of parliament, but whether an instrument, executed by an individual, was sufficient to authorize certain proceedings. It was, therefore, a matter of a private nature, and must be construed, as all contracts between debtor and creditor are construed, that is, according to the true intent and meaning of the parties. The form of the warrant is the same that has been used for more than a century past; it is general; it is comprehensive; and it has ever been taken in that sense, which give the greatest benefit to the obligee, that can be obtained from the confession of the judgment. The late act of assembly, passed Sep-

*291] tember 25th, 1786 (2 Sm. Laws, 391), which gives *original* *jurisdiction to the supreme court in Philadelphia, in § 4, plainly supposes the causes to be such as are instituted by *capias*, summons, attachments, *scire facias*, partition, or dower; all which modes are particularly specified; and it certainly holds forth no idea to prevent an amicable suit being entered, or a judgment being confessed, by a special warrant of attorney, as in the present case. It was natural to specify the common pleas of Bucks county, because the parties lived in Bucks, and the estate, upon which the mortgage was given, lay in that county: but it was certainly in the power of the obligor to give authority to enter judgment in any court within the United States—from the nature of the contract, it must be presumed that he intended to do so, as well as from the terms of the warrant, which authorize the entering the judgment in any court in America; and, agreeable to the established practice and interpretation of such warrants of attorney, the judgment has been confessed in the supreme court.

The Chief Justice delivered the unanimous judgment of the court.

McKean, Chief Justice.—We are happy that this cause has come before us, so recently after the passing of the act of assembly; as, by an early settlement of the practice, much uncertainty and litigation may be avoided.

There are two grounds upon which, we are clearly of opinion, this judgment ought to be set aside. The first is, that though it has been entered, in pursuance of a warrant of attorney, after the passing of the law, yet the bond is of a prior date; and we find it expressly enacted, "that no suit or action shall be commenced in the said supreme court, for any debt or cause which

arose before the passing of this act, except suits of the commonwealth, and such wherein the title of land, or other real estate, may come in question." For this reason, therefore, we think, that the judgment could not have been entered up, even in the county of Philadelphia.

But, in the second place, whatever doubts may formerly have been entertained, it is certain that, after the 2d of January 1787, the original jurisdiction of the supreme court is, by the 4th section of the same act restricted to the county of Philadelphia; and this judgment being entered at a subsequent period, in the supreme court, as of the county of Bucks, there can be no doubt, that the proceedings are, likewise, on that account, erroneous and irregular.

The intention of the legislature was, evidently, to prohibit the entering up judgments on bonds, &c., by virtue of warrants of attorney in that court, which should affect the lands of the party in any other county than Philadelphia; and the consequences would be so injurious, that, even if we could, we ought not to admit a different construction of the act. For, if one judgment were entered in Washington county, and another here, on the same day, by what principle could we determine, which of those judgmennts had the prior lien. The question would be productive of great perplexity in the administration *of justice; and might eventually pre- [*292
vent the transfer of lands, which it is the policy of this country to facilitate and encourage.

With respect to the other objections—the court might give the defendant leave to amend his plea, so as to remove the difficulty, which arises from the assignment of the errors in fact. And, though the question on the extent of the warrant of attorney, would require some consideration, yet, it is a rule, that the acts of the parties, as well as the acts of parliament, shall be liberally construed to promote the remedy. I have, therefore, no doubt, that if the judgment had been entered in the supreme court of the state of New Jersey, it would be deemed good there; although that court is not similar to the court specifically named in the warrant. But it is unnecessary to pronounce any determination upon these points, as our opinion is unanimous, for the other reasons which have been mentioned.(*a*)

Let the judgment be reversed.

Swift suggested, that as the judgment had been entered *coram non judice*, the plaintiff had been wantonly driven to bring the writ of error, and might, therefore, be entitled to costs. But, by—

McKean, Chief Justice.—If you had moved the court below, the same decision would have taken place; and the act of assembly is positive, that on the *reversal* here of a judgment, each party shall pay his own costs. See 1 State Laws, 273, § 7.(*b*)

(*a*) No express decision is to be found in the reports, upon the point, whether a warrant of attorney in terms similar to that in Kirkbride *v.* Durden, would authorize a confession of judgment in the supreme court; but long practice, silently confirmed by judicial authority, seems to settle the question in favor of the validity of such judgments.

(*b*) Wright *v.* Small, 5 Binn. 204; Landis *v.* Shaffer, 4 S. & R. 199; Work *v.* Maclay, 14 Id. 265.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

JUNE TERM, 1788.

TETTER *v.* RAPESNYDER.

Rule of reference.

An agreement was made to refer a case to three persons, to report, &c., without saying "or any two of them;" but the clerk in making out the rule, so expressed it: a report by two only of the referees was set aside.

THE parties, having consented to a reference, filed a written agreement appointing three persons, without saying, "or any two of them," to report; but the clerk, in making out the rule, had so expressed it. The three referees met, though only two of them signed the report; and now *Lawrence* moved to set it aside, on account of this variance between the rule and the agreement of the parties, offering to examine a witness, who was present at the transaction, to show that it was intended all the referees should concur. See Fitzg. 215.

To this, *Ingersoll*, for the plaintiff, objected; and said, that where parties have reduced their agreement to writing, particularly in the case of a record, nothing by way of addition or alteration was admissible. To prove a name meant, or a fraud committed, and some other similar circumstances, were, he insisted, the only exceptions to this principle. But—

BY THE COURT.—The question is not, whether parol testimony shall be given against a record; but whether the agreement filed in the court, was a sufficient authority to the clerk to make out the rule to any two of the referees. If this was his mistake, it certainly ought not to bear against the defendant.

The witness being examined, and having proved the defendant's allegation, the opposite counsel contended, that as the rule had been before the referees and was inspected, not only by them, but by the parties, it was too late to make the objection: for, it would be unjust to allow this advantage to the defendant, after the whole business had been discussed, and the report agreed upon.

Whiteside v. Oakman.

Lawrence proposed reading some cases to show, that the authority given to the referees, by the act of the parties, ought to have been strictly pursued. But—

By the Court.—There would have been something equitable in the objection to the report, if only two of the referees had met; but, as it appears that they all entered on the business, though only two of them have subscribed the report, we can consider nothing but the evident mistake of the clerk; and, for that reason alone—

Let the report be set aside.(*a*)

Thompson *v.* Young.

Insolvency.

Effect of a discharge under the insolvent law of another state. Millar v. Hall, *ante*, p. 229, re-affirmed.

On a rule to show cause why an *exoneretur* should not be entered on the bail-piece, it appeared, that the defendant was a resident of Maryland (though he came occasionally to Philadelphia upon business), and was duly discharged under the insolvent law of that state. Upon the authority of *Millar* v. *Hall*, *ante*, 229, the rule was made absolute.

Sergeant and *Ingersoll*, for the plaintiff, attempted to establish this distinction, that in *Millar* v. *Hall*, the defendant was a citizen of Maryland, and that the money, for which the action was brought, had been received in Baltimore; but that in this case, Young, though sometimes in Maryland, was in fact, a citizen of Pennsylvania, and that the debt was contracted here. They acknowledged, however, after the examination of the witnesses, that they had failed in their proof; and therefore, no argument was made in support of the distinction.(*b*)

Whiteside *v.* Oakman.

Foreign attachment.

It is too late, to move to quash a foreign attachment, after judgment has been regularly entered upon it.

This was a foreign attachment, returnable to December term, 1787, in which judgment had been entered agreeable to the act of assembly.

Ingersoll now moved, for a rule to show cause why the attachment should not be quashed; observing, that if the same thing might be done in a circuitous manner, he supposed it could not, in this way, be deemed too late; for, upon entering special bail, the plaintiff might be called on to show cause of action; and attachments are often set aside, where no cause is shown.

(*a*) See Russel *v.* Gray, 6 S. & R. 145; Kingston *v.* Kincaid, 1 W. C. C. 148; Lattimore *v.* Martin, Addis. 11; Howard *v.* Pollock, 1 Yeates 509.

(*b*) See James *v.* Allen, *ante*, p. 188; and Millar *v.* Hall, p. 229; and the notes to those cases.

Morgan v. Eckart.

SHIPPEN, President.—It is very late to move for a rule of this nature. If there is a mistake in the proceedings, but not on the merits, a rule to show the cause of action may be required, after special bail is entered. We should be afraid, however, of introducing so dangerous a practice as would be countenanced by granting the present motion.

*295] *Ingersoll* said, that, if the court were of opinion, that he was too late, he should not certainly press the question; but waive his motion; which was accordingly done.(*a*)

MORGAN *v.* ECKART *et al.*

MORGAN *v.* BOWER.

Privilege from arrest.

The sheriff-elect of a county, who came to Philadelphia to solicit his commission and give the usual security, was held not to be privileged from arrest on civil process.

So, of the lieutenant of a county, who came to Philadelphia to obtain commissions for officers of the militia.

ON a rule to show cause, why the arrest in these actions, should not be set aside, it appeared, that Eckart, being the lieutenant of Berks county, came to Philadelphia, in order to obtain from the Executive Council, the commissions of some officers of the militia, within his department; that Bower, being one of the sheriffs elect of the same county, came for the purpose of soliciting his commission, and giving the usual security; and that while here for these respective purposes, they were both arrested at the suit of the plaintiff.

Tilghman, in support of the rule, contended, that the defendants were privileged from arrest, on account of the public nature of the business which brought them to Philadelphia; and stated, as the great principle upon which privilege and protection are founded, that the rights and interest of the commonwealth must, in many cases, be preferred to those of individuals. Vin. tit. Priv. 84, pl. 1. He then classed the cases of privilege under two general positions: 1st. That where by law it is a man's duty to attend at a particular place or court, he shall be sued there only; and no one shall be compelled to undertake anything inconsistent with such duty, or with his profession, in particular cases. Vin. tit. Priv. 509, pl. 1; Cro. Car. 585; Sir W. Jones, 462; Str. 1107; 3 Leon. 149; Vin. tit. Priv. 513, pl. 8; Barn. Notes, 200, 378. And 2d. That where a man is under a legal obligation to attend, or where he goes to demand justice, he

---

(*a*) In Penman *v.* Gardner, 4 Yeates 6, a rule was granted to show cause of action, at the third term, and after judgment entered, notice having been given of the intended motion, before judgment. The court said in that case, "The general rule laid down in Whiteside *v.* Oakman, we adopt. But there certainly may be just exceptions to it, in some instances which may be put. Suppose, a foreign attachment levied, which is wholly unwarranted, of which the defendant should have no notice, until judgment was obtained, and he should immediately apply to the court, would not the court grant him redress?" See also Milen *v.* McFarland, stated in Sergeant on Attachments, p. 138; Kearney *v.* McCullough, 5 Binn. 389.

shall not be arrested at all. Vin. tit. Priv. 515, pl. 6 ; Com. 446 ; 1 Brownl. 15 ; 2 W. Black. 1113 ; 1 Atk. 54 ; Str. 1094 ; Vin. tit. Priv. 512, pl. 18 ; Id. 514, pl. 12, 13 ; Id. 515, pl. 6.

In the present instances, he urged, that it was incumbent upon the sheriff to wait on the Executive Council, as the law required him to give such security, as they should approve ; and, with respect to the lieutenant of the county, he alleged, if the court now doubted, they would be satisfied upon inquiry, that he likewise was in the prosecution of his official duty, on the above-mentioned occasion.

He then adverted to the impolicy of increasing the jealousy that seemed to subsist already too much, between the city and the remote parts of the state ; but this, he predicted as an inevitable and ruinous consequence, if, whenever a countryman came hither upon public business, he was liable to be arrested and detained. The city would soon be likened to the lion's den, towards which innumerable tracks of feet might be traced, *sed nulla vestigia retrorsum.*

**Sergeant* and *J. B. McKean*, for the plaintiff, stated, that the cases [*296 of privilege in England, were limited to an attendance upon parliament, or upon courts, as a party, juror, witness or officer ; and that all the authorities which had been cited for the defendants, were fully comprehended within these bounds. They admitted, that reasonable privilege had, likewise, been allowed in Pennsylvania, but denied that, in either country, the doctrine had been extended to the object of the present rule. For, they insisted, that the sheriff's attendance upon the Executive Council, was voluntary, in order to solicit an appointment, which, notwithstanding his being on the return, the council might, at pleasure, grant or refuse. Neither was he bound to give security, until he was appointed ; and, even then, it was not necessary to be given in the city of Philadelphia. With respect to the lieutenant of the county, nothing, they said, could be more evident, than that his visit to Philadelphia was an act of supererogation, to perform what no law required him to do, and what might as well have been performed through the agency of a post-rider.

If, indeed, the attendance of the sheriff or of the lieutenant of the county had been required by the Executive Council ; or, if they had been brought before that board by any legal process ; they might then have claimed the advantage of the general rule of privilege. But there can be no pretence in reason, or law, to exempt from an arrest either a man who voluntarily comes to solicit an office ; or one who undertakes a journey merely to oblige his neighbors, by bringing them their commissions.

At an adjourned sitting held on the 6th of September, the President delivered the clear and unanimous opinion of the COURT, that the defendants were not protected from arrests, for any cause that had been shown. He observed, that they had not been required by the Executive Council to attend them, but evidently came to Philadelphia on their own private business; and that it was the duty of the court, to be careful not to extend the doctrine of privilege to the injury of honest creditors.

The rule discharged.(*a*)

(*a*) See note to the next succeeding case.

Bolton *v.* Martin.

Privilege from service of process.

A member of the state convention, which assembled at Philadelphia to consider the constitution of the United States, was held to be privileged from the service of a summons or arrest, during the session, and for a reasonable period before and after it.

The defendant was one of the members from Bedford county, in the state convention, which assembled at Philadelphia, to take into consideration the adoption or rejection of the constitution proposed for the government of the United States, by the federal convention, on the 17th of September 1787. During his attendance upon this duty, he was served with a *summons*, at the suit of the plaintiff; and *Sergeant* obtained a rule to show cause why the
*297] process should *not be quashed, upon a suggestion that the defendant, acting in this public capacity, was entitled to privilege.

The case was elaborately argued by *Levy*, for the plaintiff; and *Sergeant* and *Bradford*, for the defendant.

Levy represented the question to be, simply, whether a member of the state convention was protected, during the sessions of that body, from being served with a *summons?* He remarked, that there appeared to be a strong distinction between the privileges of a permanent legislature, and those which might be claimed by a convention called for a temporary purpose; but waiving any argument arising from that source, he contended, that there was no similitude between the deliberative bodies of England and Pennsylvania; and that, consequently, the privilege of parliament in that country, was not capable of a strict application in this. The English constitution, consisting of three branches, was so constructed as to prevent the encroachments of one branch upon another, and privilege, as allowed in England, was the necessary result of that principle. The privilege of the House of Lords might, perhaps, be founded on immemorial usage; but if the members of the House of Commons had not, likewise, been protected from arrests, it is easy to perceive, that their deliberations and decisions might, at any time, have been interrupted by the practices of the other branches of the government. But if we must still be referred to the privilege of parliament, he insisted, that the protection of a member of the house of parliament, extended only to the case of arrests, or personal restraint, and not to the service of a *summons.* Atk. Tracts 41, 42, 43; s. c. 1 Mod. 146. Nay, we find, that anciently the courts of justice only took cognisance of the privilege of parliament, to deliver the party out of custody, and not to abate the suit brought against him. 1 Black. Com. 166; Dyer 59, 56. With respect to the nature of privilege, he argued, that, in modern times, it is become an odious and unpalatable doctrine; and that if it were *res nova*, a very doubtful question might be made, whether the advantage which the public derives from the protection of its servants against vexatious and malicious arrests, compensates for the injury done by screening a man from the payment of his just debts. The policy of Queen Elizabeth's observation, that "he was no fit subject to be employed in her service, that was subject to other men's actions, lest she might be thought to delay justice,"(*a*) deserves to be well con-

---

(*a*) See Co. Litt. 131.

sidered in a republic; and it appears, indeed, to have operated considerably, even in that kingdom, from which all our precedents on the subject are derived. Statute after statute has been framed, to narrow this infraction of the common law; and, by the influence of Lord Mansfield's eloquence, the statute of the 10 *Geo. III.*, c. 50, seems at length to have placed it upon a safe and reasonable foundation; for a peer of the most distinguished rank may, at this day, be served with a *summons*, during the sitting of parliament. 1 Black. Com. 166. But even when the pretensions of the commons were exalted to their greatest height, it was always admitted that their privilege was given for the *benefit of the people at large, and not for the benefit of the individual. Sir T. Raym. 142. How, then, can the interest of the people be affected by a process which imposes no restraint upon the person, and occasions no interruption of the public business? Nor was the privilege of the English Commons ever extended by analogy to other deliberative bodies. Until the statute of 8 *Hen. VI.*, c. 1, was passed, in the year 1427, the members of the convocation (which was then a deliberative assembly whose decisions, in matters within their jurisdiction, were taken to be law) were liable to arrests; and to remove every doubt, whether this was merely a declaration of the ancient law, or an introduction of something new, 3 Black. Com. 289, says expressly, that the privilege was given by that statute. [*298

If, then, we are to be governed by the privilege of the British parliament, in determining this question, are we to receive that privilege entire—in its *duration* commencing forty days before, and continuing forty days after the session; and in its *object* extending to the servant as well as to the master? Or, are we to receive it divested of its more odious trappings, and purified by the wholesome restrictions of modern statutes? If the latter proposition prevails, we have shown that privilege cannot protect the defendant from the service of a *summons*; and with respect to the former, though, it is true, we have adopted the municipal regulations of that nation for the security of property, and the punishment of crimes, yet, does it follow, that we are to be incumbered with the various extravagancies of their political system, exhibiting to the world the absurd portrait of a republic, with the heterogeneous features of a monarchy? In this country, a universal equality is established; no jealous and rival powers warp the legislature; the distinctions of rank and degree are unknown, except, indeed, in the honorable pre-eminence which the voice of the people periodically bestows on the most worthy; and surely, the privileges of the Sophi of Persia, or the Mufti of Constantinople, are as fit to be engrafted on a constitution of this description, as the privilege of the British peerage, or their house of commons.

But, after all, if the essential difference in the principles of government, should not be sufficient to exclude the privilege contended for, the 5th sect. of the Art. Confed., which has been incorporated into the new federal system, is tantamount to a solemn declaration, that no such privilege exists; for there, congress, in defining the privilege of its members, secure them from arrest and imprisonment, but not from the process of a summons. Will it, therefore, be asserted that the defendant, in the present case, is entitled to greater privileges, than he would have enjoyed as a member of that honorable body? The idea is contrary to reason and propriety; and

if we must argue from analogy, there can be no doubt, that we ought rather to apply to congress for the precedent, than to the parliament of Great Britain.

Sergeant, for the defendant. The exemption from arrest in the case of *299] members of parliament, is totally unconnected with the political *system of King, Lords and Commons. It is a privilege granted for this end, that the administration of the government may not be interrupted or damaged, by the circumstances arising from the private affairs of those who are called into the public service; and as a necessary consequence of this principle, it belongs to every national body, constitutionally assembled for legislative purposes. The members of the house of commons in England would, therefore, have been entitled to it, even if no king or house of lords had been known to their constitution; the congress of the United States must have enjoyed it, though the articles of confederation had been silent upon the subject; and the sovereigns of a free people, convened in a single house, are surely not less entitled to that distinction, than if they had only formed a third branch of the government. That the privilege is applicable to the legislature of Pennsylvania, must, then, be acknowledged, though it certainly is not conferred by any positive law; nor can it be denied to a convention acting under the immediate sanction and authority of the people, upon a question of the highest importance to the general interests of the community. Their power, though directed to a particular object, was derived from the same source which supplies the permanent legislature of the state; and their business equally required a protection from vexatious interruptions and intrusions. In short, there is a sanctity in the character of the representatives of an independent people, which is the true foundation of privilege; and it is recognised, not only for municipal purposes, but by the law of nations, for the protection of monarchs, their ambassadors and other public ministers; in which respect no positive statute will be found to mention it, until the reign of Queen *Anne.*(*a*)

With respect to the distinction that is attempted, that the privilege is only from arrests, and not from being impleaded, it can neither be supported by law, nor the reason of the case. The service of a bill of Middlesex, which is no restraint upon the person, was held to be a breach of privilege, under circumstances infinitely less important than an attendance upon the state convention. 2 Str. 1094. In the case of *Col. Pitt*, the whole proceedings, upon mature consideration, were done away: 2 Str. 990, and 2 Ld. Raym. 1113, show, that, though an original might be sued out, and continued down, in order to avoid the statute of limitations, yet the sanctity of the person could not, in the smallest degree, be violated. Even the case which has been relied on from Atk. Tracts, declares that he shall neither be arrested nor impleaded. It would, indeed, be nugatory, if an exemption from the trouble of entering special bail was all the advantage privilege conferred; as the public service would still be left exposed to the interruptions of an anxious attendance upon a litigious suit, and all its concomitant circumstances of instructing lawyers and collecting witnesses.

(*a*) See 7 Ann. c. 12, and the history of that statute, in 1 Bl. Com. 255.

Bradford, on the same side, arranged his argument under two propositions: 1st. That such a thing as privilege existed in Pennsylvania; *and 2d. That it extended to the case of a *summons*, as well as a *capias*. [*300

1. He said, that where there was the same reason, there ought to be the same law; and if the purpose of privilege was to prevent a man's being drawn aside from his public duty, or embarrassed with private cares, during his attendance upon it, that fundamental principle operated, at least, with as much force in Pennsylvania as in England; and in the case of the state convention (whose business was of the most critical nature), perhaps, more than in the case of any permanent deliberative assembly. But, he asked, what writer has ever treated privilege as the result of a form of government, composed of three branches? Experience contradicts the assertion. Even in England, a member of parliament cannot plead his privilege against a debt due to the crown, so superior is prerogative; the privilege which the law of nations confers upon ambassadors, is not the result of any particular form of government; nor does the privilege recognised in courts of justice, rest upon so equivocal a basis. Is a suitor here protected from arrests upon any political consideration? or, can it be said, that a witness at this bar, owes his security to the texture of the constitution? No, these are the effects of an universal principle, which equally applies in all countries, and under every modification of government; for, when the business of the state requires the attendance of an individual at a particular place, it would be unreasonable and unjust, to expose him to an inconvenience, which he would not have suffered, but for that attendance; it would be impolitic, likewise; for a few men would be willing, on such terms, to engage in the public service.

2. The preceding argument must serve, likewise, to show, that the privilege extends to the case of a *summons* as well as a *capias*. For, though the defendant avoids the trouble of entering special bail; yet the former process, as well as the latter, will oblige him to attend the court from which it issues, however remote it may be from his fixed place of residence. But in the present case, the defendant is not solicitous to be discharged from the suit, for he will engage to appear *gratis* in the proper county.

The difficulty, in fact, arises from the nature and extent of the jurisdictions of our courts. In England, the jurisdiction of the king's bench and common pleas being co-extensive with the kingdom, those courts can direct the *venue* to be laid in the county where the cause of action originated. But here, our county courts are in their nature circumscribed; and it has lately been determined in the supreme court, on a motion by Mr. *Sergeant* to change the *venue* from Bucks to Philadelphia, that, even there, this relief could not be obtained; for the act of 1766(*a*) expressly declares, that the *venue* shall be laid in the county where the action is instituted. The defendant's claim, therefore, is rather the privilege of being sued in a particular court, than an exemption either from arrest, or being impleaded; and we say, that he ought not to be sued in this *court, because it was the public, and not his private business, that brought him within its jurisdiction. [*301

By an act passed in the year 1683 (although since repealed),[1] a summons

(*a*) See 1 State Laws, 114 and 338.

[1] Act 25th October 1683, repealed on the 10th May 1684. Old Province Laws, 162, 167.

might have been served in any county, at any time, with an exception, allowing, in the case of a member of assembly, a protection for the space of fourteen days after the sessions. Shall it then be said, that any individual might compel a judge of the supreme court to attend a private suit upon the Ohio, by serving him with a summons, while he is discharging his official duties on the western circuit? We contend, that the interest of the commonwealth requires that persons employed in such services, should not be incommoded; there is no necessity, therefore, to derive the privilege by the analogy of other cases; it arises from the nature of the thing; and many authorities show, that the rule is as forcible to prevent their being impleaded, as to prevent their being arrested. 2 Str. 1094; Vin. tit. Priv. 519. A man, by the law of Pennsylvania, may be his own counsel; if he exercises this right, is he not as much drawn from the public service by a *summons* as by a *capias?* In *Matlack's case*, the court would not issue a *subpœna* to two members of the assembly (Delaney and Hill), who were witnesses in the cause; but a letter was written to the speaker, stating the necessity of their attendance, and a vote of the house was taken to allow it.(*a*) In *Col. Pitt's case*, he was entirely discharged from a *capias*, without common bail being ordered; from which it may be fairly inferred, that he ought not to have been sued at all; as the effect of common bail, and a *summons* are, in that respect, the same.

The case cited from *Pryn*, in Atk. Tr. is not in the Year Books, and it could not have been within the knowledge of the writer, as it is said to have happened in the reign of *Edw. III.* For this reason, it bears a doubtful complexion; nor, do we know that the decision was on the case before the court; and, at all events, there is an essential difference in privilege, when it is extended to the servants (who have no public cares to claim their attention), and when it relates to the master.

Levy, in reply.—He said, that he had not asserted that a member, either of the assembly or convention, was liable to *arrest* during the sitting of those bodies; but that he had expressly narrowed the question to this point, whether he might be served with a *summons?* Nor had he insisted on the idea, that the convention was not entitled to the same privileges which a permanent legislature might claim; but merely suggested a distinction for the consideration of the court. He contended, however, that a member of the British house of lords, since the 10 *Geo. III.*, c. 50, was not entitled to the privilege claimed by the defendant; and, he asked, whether such privileges ought to be introduced and established in Pennsylvania, as only ex-

---

(*a*) In the case of United States *v.* Cooper, 4 Dall. 341, the defendant applied to the court for a letter, to be addressed by them to certain members of congress, then in session, requesting their attendance as witnesses; and several cases arising in this state, were referred to, in support of the application; but Judge CHASE said, "I do not know of any privilege, to exempt members of congress from the service or obligations of a *subpœna*. I will not sign any letter of the kind proposed. If upon service of a *subpœna* the members of congress do not attend, a different question may arise; and it will then be time enough to decide, whether an attachment ought, or ought not, to issue." Judge PETERS, however confirmed the statement, as to the practice in Pennsylvania, and expressed his willingness to acquiesce in the defendant's application. See also United States *v.* Caldwell, 2 Dall. 333, in note.

isted in the dark ages of the English government, and which the reason and justice of more enlightened generations had happily corrected? Finding, indeed, that they had failed in point of fact, with respect to the existence of such a parliamentary privilege as *they claim, he said, the adverse counsel had entered elaborately into arguments *ab inconvenienti*. But in doing this, no answer had been given to the reason for passing the 8 *Hen. VI.*, *c.* 1, by which statute the members of the convocation were first exempted from personal arrest. [*302

Where, however, is the great inconvenience of a suit, if it is not founded in malice, or instituted in a subordinate and incompetent jurisdiction? neither of which can be pretended upon this occasion. Is there anything more required, in its first stages, than to direct an attorney to enter an appearance? When, indeed, the cause is ready for trial, at the distance of, perhaps, many months, and long after the business of a deliberative assembly constituted for similar purposes as our state convention, must be closed, it will be necessary to prepare for a defence, if there is any in the cause; but is this so severe a hardship as to distract a member of the assembly, or convention, in the prosecution of his duty, and to disqualify him for the public service in which he is employed?

Nothing appears to show that any other county is a more proper county than this; so that the offer to appear *gratis* might have been spared; as well as the argument respecting the *venue*, which is an inconvenience that extends to all cases; is equally felt by every citizen: and, proving too much, it must be taken to prove nothing.

The act of 1683 has been long repealed; and the distinction attempted between a *capias* and *summons* does not apply; for every writ irregularly issued must be set aside; and therefore, if a man is illegally arrested, common bail ought not to be ordered.

With respect to the instance of an application to the speaker of the assembly, requesting the attendance of two members, that was in the case of witnesses; and as the court, after issuing a *subpœna*, must have compelled obedience to it, by attachment, a very serious question, between the legislative and judicial authority, was prudently avoided by the step then taken.

If the privilege in England is not the result of their form of government, why does it exist forty days before, and forty days after the sessions, in the case of the members for Middlesex and London, who certainly do not require so long a protection *eundo et redeundo*. But the whole argument is to be determined by an analogous consideration of the 5th sect. of the Art. of Confed.

On the 6th of September, the President delivered the opinion of the court.

SHIPPEN, President.—The question in this case, is, whether a member of convention, residing in a distant county, could legally, and consistently with the privileges of such a deliberative assembly, be arrested or served with a summons, or other process, out of this court, issued to compel his appearance to a civil action, while he remained in the city of Philadelphia attending the duties of that office?

*The members of convention, elected by the people, and assembled for a great national purpose, ought to be considered, in reason, and from the nature as well as dignity of their office, as invested with the same [*303

or equal immunities with the members of General Assembly, met in their ordinary legislative capacity: and in this light, I shall consider them.

The Assembly of Pennsylvania being the legislative branch of our government, its members are legally and inherently possessed of all such privileges, as are necessary to enable them, with freedom and safety, to execute the great trust reposed in them by the body of the people who elected them. As this is a parliamentary trust, we must necessarily consider the law of Parliament, in that country from whence we have drawn our other laws. That part of the law of Parliament, which respects the privileges of its members, was principally established to protect them from being molested by their fellow-subjects, or oppressed by the power of the crown, and to prevent their being diverted from the public business. The parliament, in general, is the sole and exclusive judge and expositor of its own privileges: but, in certain cases, it will happen, that they come necessarily and incidentally before the courts of law, and then they must likewise judge upon them.

The origin of these privileges is said by Selden to be as ancient as Edward the Confessor. For a long time, however, after the conquest, we find very little, either in the books of law, or history, upon this subject. If there were then any regular parliaments, their members held their privileges by a very precarious tenure. There appears, indeed, in the reigns of *Henry IV.* and *Henry VI.* to have been some provisions made by acts of Parliament, to protect the members from illegal and violent attacks upon their persons. In the reign of *Edward IV.*, there has been a case cited to show, that the judges determined that a menial servant of a member of parliament, though privileged from actual arrest, might yet be impleaded. Although it were fairly to be inferred from the case, that the privilege of the servant was equal to the privilege of the member himself, yet a case determined at so early a period, when the rights and privileges of parliament were so little ascertained and defined, cannot have the same weight as more modern authorities.

Upon an attentive perusal of the statute of 12 & 13 *Wm. III.*, *c.* 3; I think, no other authority will be wanting to show what the law was upon this subject, before the passing of that act. From the whole frame of that statute, it appears clearly to be the sense of the legislature, that, before that time, members of parliament were privileged from arrests, and from being served with any process out of the courts of law, not only during the sitting of parliament, but during the recess within the time of privilege; which was a reasonable time *eundo et redeundo*. The design of this act was not to meddle with the privileges which the members enjoyed during the sitting of parliament (those seem to have been held sacred), but it enacts, that after
*304] the dissolution or prorogation of parliament, or *after adjournment of both houses, for above the space of fourteen days, any person might commence and prosecute any action against a member of parliament, provided the person of the member be not arrested during the time of privilege. The manner of bringing the action against a member of the house of commons is directed to be by *summons* and *distress infinite*, to compel a common appearance; but even this was not to be done, until after the dissolution, prorogation or adjournment. The act further directs, that where any plaintiff shall, by reason of privilege of parliament, be stayed from prosecuting

any suit commenced, such plaintiff shall not be barred by the statute of limitations, or nonsuited, dismissed, or his suit discontinued for want of prosecution, but shall, upon the rising of parliament, be at liberty to proceed. So that before the rising of parliament, and during the actual sitting of it, it appears, not only that, generally, a suit could not be commenced, but, if it had been commenced before, it could not be prosecuted during that time. One exception, as to commencing the action, appears to have been made by the judges, agreeable to the spirit and apparent intention of the act; which is, that in order to prevent a member of parliament from taking advantage of the statute of limitations, by reason of his privilege, an *original* might be filed against him; but that original must lie dormant, during the sitting of parliament, no process could issue upon it to compel an appearance; nor until this act passed, could it have been done at any time, after the rising of parliament, during the time of privilege.

This construction of the act is so obvious, that, upon any other, almost all the provisions in it would have been nugatory; and it fully accounts for the seeming doubt in *Col. Pitt's case* in Strange, whether he should be discharged on common bail, or be discharged altogether; it being after the dissolution of parliament, the plaintiff had a right, by the act, to commence a suit against him; and therefore, it seemed, at first, that he should only be discharged on common bail; but as he had commenced his suit by *arresting his person*, before his time of privilege expired, the judges, that they might not seem to countenance the arrest, discharged him entirely.

If it were possible to doubt of this being the true construction of the act of 12 & 13 *Wm. III.*, it is made still clearer, by the act of 2 & 3 *Ann. c.* 18, which directs that any action may be commenced against a member of parliament employed in the revenue, or other place of public trust, even during the sitting of parliament, for any misdemeanor, breach of trust, or penalty, relating to such public trust, provided his person be not arrested. This act was made for this single purpose, and would have been likewise nugatory, if an action could have been brought before, against any member of parliament, during the sitting of the house.

Black. Com. 165 was cited, to show, that a member of parliament might be sued for his debts, though not arrested, during the sitting of parliament. This will appear to be expressly confined to actions at the suit of the King, under a particular provision in the statute of *Wm. III.*, *and, by the strongest implication, shows, that it could not be done at the suit of a private person. A little higher, in the same page, a general position of Judge Blackstone will be found, which fully reaches the case in question. "Neither (says he) can any member of either house be arrested, or taken into custody, nor served with any process of the courts of law, nor his servants arrested, &c., without a breach of the privilege of parliament." [*305

In the case before us, the defendant appears to have been served with a *summons* out of this court, during the time of the actual sitting of the Convention. Whether we take the law to be, as it stood in England before, and at the time of passing the act of *Wm. III.*, or as it stood after the passing that act, down to the 10th of *Geo. III.*, about six years before our revolution, it is clear, that no member of parliament, other than those particularly excepted, could be arrested or served with any process out of the courts of law, during the sitting of parliament.

Bolton v. Martin.

We cannot but consider our members of assembly, as they have always considered themselves, entitled by law, to the same privileges. They ought not to be diverted from the public business by law-suits, brought against them during the sitting of the house; which, though not attended with the arrest of their persons, might yet oblige them to attend to those law-suits, and to bring witnesses from a distant county, to a place whither they came, perhaps solely, on account of that public business.(*a*)

The defendant, therefore, must be discharged from the action.(*b*)

(*a*) In the case of the United States *v.* Edme, 10 S. & R. 147, Judge DUNCAN said, that the privilege of protection "has extended itself, in process of time, to every case where the attendance was a duty, in conducting any proceedings of a *judicial* nature;" and the case in the text shows that the privilege extends to protect all persons engaged in public business of a *legislative* character, from the service of a *summons*, as well as from *arrest*. To the same effect (in the case of suitors) is Miles *v.* McCullough, 1 Binn. 77; though the rule of the circuit court appears to be different in this respect. See Blight *v.* Fisher, Peters C. C. 41. In Geyer *v.* Irwin, 4 Dall. 106, the court recognised the principle, that a member of assembly is privileged "from arrest, summons, citation, or other civil process," during his attendance on the public business; and expressed their *opinion*, that his suits could not be forced on to trial, during the session. But the attorney of the defendant, in that case, having confessed a judgment, the court refused to open it on the ground of privilege, which had not been mentioned, when the cause was called for trial. See also Coxe *v.* McClenachan, 3 Dall. 478.[1]

(*b*) Since these reports were committed to the press, I have been favored with a note of another case in this court, upon the question of privilege; and, I hope, I shall be excused for introducing it here.

CALDWELL *v.* BARCLAY *et al.*

Foreign attachment.—*Moylan* obtained a rule to show cause why this attachment should not be quashed, on the ground, that one of the defendants, Barclay, being an American consul, and in that character actually residing abroad in the public service, was not within the description of persons, whose effects were made liable to a foreign attachment by the act of assembly.

The rule was opposed by *Wilson*, *Bradford* and *Sergeant*, who contended, that as a consul, Barclay was not entitled, by the laws of nations, to any privilege or exemption from legal process; that, even if he was privileged on account of his official character, he had lost that advantage, by his partnership with the other defendant, who was not entitled to it; and that the act of assembly makes no difference between persons serving their country abroad, and other non-residents.

After an able argument, the opinion of the court was delivered by Mr. President SHIPPEN; agreeable to which—

The rule was discharged.

See Dupont *v.* Pichon, 4 Dall. 323; United States *v.* Ravara, 2 Id. 299; as to the privileges of a consul.

[1] One who goes to Washington, duly commissioned to represent a state in Congress, is privileged from arrest, *eundo*, *morando et redeundo*, though it be subsequently decided that he is not entitled to a seat. Dunton *v.* Halstead, 2 Clark 450. And see that case, as to what are valid excuses, for failure to return home immediately after the decision. But the exemption only extends to civil process. Bullard's case, 4 W. N. C. 540.

KUNCKLE *v.* WYNICK.

An action of covenant will lie against a lessee, on an express covenant for payment of ground-rent, although after an assignment by him of the term, and although the lessor has accepted rent from the assignee.

COVENANT. The argument arose upon the following case stated for the opinion of the court: "John Kunckle, on the 7th day of Oct. 1784, conveyed to Nicholas Wynick, in fee simple, a lot of ground *in the [*306 Northern Liberties of the city of Philadelphia, reserving a rent-charge of forty dollars per annum, payable on the first day of October annually. Before any rent was due, Nicholas Wynick, on the 15th of July 1785, assigned and conveyed all his interest in the premises to Henry Myers. The plaintiff accepted one year's rent of the assignee. The question is, whether he can recover in the present action, which is for one year's rent accruing subsequently to that paid?"

The conveyance from Kunckle to Wynick contained the following clause: "And the said Nicholas Wynick, for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree, to and with the said John Kunckle, his heirs and assigns, that he, the said Nicholas Wynick, his heirs, or *assigns*, shall and will, at his and their own expense, within one year from the date hereof, erect, build and finish, on the hereby-granted lot, one good substantial dwelling-house, at least sixteen feet square and two stories high, with a cellar under the same, walled up with brick or stone; and shall and will, from time to time, and at all times hereafter for ever, well and truly pay, or cause to be paid, unto the said John Kunckle, his heirs or assigns, the aforesaid yearly rent or sum of forty dollars," &c.

Rawle, for the defendant, made two points: 1st, Whether the sentences in the clause above stated from the deed, could be so coupled and interwoven, as to create an express covenant on the part of the grantor, that his *assigns* should pay the rent-charge? and 2d, Whether acceptance of rent from the assignee, was not a bar of the plaintiff's demand of the rent from the assignor?

1. On the first point he endeavored to construe the covenant, so as to extend it to the assigns of Wynick, only in the case of building the dwelling-house, and not in the case of paying the rent. But he did not seem to expect much success from this discrimination.

2. On the second point, he argued, that this was a rent issuing out of the land, which the plaintiff had elected to pursue, by his acceptance of rent from the assignee; and that this acceptance was a bar to his demand against the defendant. Cro. Jac. 522; 3 Co. 22; 2 Bulstr. 152. He admitted, that 3 Lev. 233, s. c. Saund. 240, appeared to be strong against him; but contended, that in truth, they ought not to have any weight with the court, since the present question was not immediately in agitation in those cases, and consequently, what has not been expressly adjudged, cannot be set up as an authority. As 1 Bac. Abr. 536, is founded on 3 Lev. 233, it must necessarily follow the fate of its principal. With respect to Keb. 640, he presumed, that the reporter had been guilty of some mistake, and questioned whether his doctrine had been received even in England.

But he urged, that whatever might be the practice there, the laws and

circumstances of Pennsylvania had rendered a different one necessary here; for the acts of assembly, altering the common law, carried with them many consequences, which were not expressly provided for in the acts themselves; as in the case of *real estates* made *subject to executions for debt, and in the case of a *devastavit* committed by an administrator. He insisted, that the policy of the laws of this state was to facilitate the transfer of lands, in contradiction to the genius of the common law; that, therefore, it might be incumbent upon the English courts to enforce with the greatest strictness the express covenants in a conveyance; but that our courts ought rather to construe them liberally, so as to prevent unnecessary embarrassments in the change of property. If, then, the defendant is liable for the last year's rent, he must be liable, by the same rule, for the rent of forty years' standing, and thus, as the grantor of a rent-charge can never be exonerated, or even safe in the disposal of the estate from which it issues, the restraints on sales and transfers will become daily more numerous, and more injurious to the public welfare.

*307]

Millegan, for the plaintiff, observed, that as the first point was a matter of mere construction, he should leave it implicitly to the court.

With respect to the second point, he contended, that the difficulty had arisen from not distinguishing properly between actions of debt and actions of covenant: For, he granted, that an action of debt would not lie in this case; as it requires privity of estate to support it; but that the action of covenant required only privity of contract, and, therefore, would well lie against the grantor of the rent-charge, after his assignment. In support of this distinction he cited 1 Roll. Abr. 522; Cro. Car. 580; 1 Saund. 240; 2 Keb. 640; 1 Bac. Abr. 536., tit. Covenant; Cro. Jac. 309; Sid. 402.

Shippen, President.—The question in this case is, whether on a ground-rent deed, wherein there is an express covenant on the part of the lessee for payment of the rent, and he assigns over the premises, and the lessor accepts rent from the assignee, an action of covenant will lie for the lessor against the lessee, for the subsequent rent.

The distinction between actions of debt and actions of covenant in this case, is too well established to be now unsettled. The action of debt lies upon the privity of estate, which is utterly extinguished between the lessor and lessee, by the lessor's acceptance of rent from the assignee. The action of covenant, when founded upon an express covenant, lies not upon the privity of estate, but privity of contract, which cannot, by the assignment of the premises, or by any act of the lessee, or by acceptance of the rent, be transferred from him. The covenant, however, must be an express covenant, not an implied one, or a covenant arising by operation of law, as by the words "yielding and paying" &c., in the deed.

The cases in the books upon this point are generally of actions of covenant for not making repairs; and a distinction has been attempted to be made between those and actions for the rent; in the latter case it is said, that the land being the fund out of which the rent is to issue, and that being transferred, the lessor's acceptance of *rent from the assignee will take away all remedy against the lessee himself. I have looked for this distinction in the books, but cannot find it in any case where there was an express covenant for the payment of the rent. The cases found the law

*308]

upon the personality of the contract; which extends equally to the payment of the rent, as to the making repairs; and though the authorities are not so numerous in the one case as the other, yet they are as express. 2 Keb. 240, and 2 Barnard. 372, are full to the point. If these books are thought to be of doubtful authority, 1 Roll. Ab. 522, cites two cases, where the breach of covenant was for non-payment of the rent. In 1 Sid. 402, where the court draws the distinction between debt and covenant, they expressly mention the action to be for the rent; and the case in 3 Lev. 283, is likewise covenant for non-payment of the rent.

As to the argument *ab inconvenienti*, I cannot see how it operates more in this country than in England. If lessees mean not to be personally bound, after assignment, they should take care what covenants they enter into. If they will, in express words, covenant for the payment of the rent, they must be bound by it. Judgment for the plaintiff.(*a*)

Wells *et al.*, appellants, *v.* Fox.

Party-walls.—Ejectment.

Ejectment is the proper mode of determining a title, on an appeal from regulators of party-walls under the act of 1782.

This was an appeal from the determination of the regulators of party-walls, &c. *Howell* moved that a *venire* should issue, agreeable to the third section of the act passed the 15th of April 1782 (2 Sm. Laws, 48), allowing the appeal to the next court of common pleas, and enacting, that thereupon "the said court (upon security being entered, &c.), shall direct a *venire* to the sheriff, &c."

Sergeant thought that the question ought to be tried upon a feigned issue, or under an ejectment; to either of which he would agree. But by—

Shippen, President.—A feigned issue can only determine, whether the regulators have done right or not; it cannot determine the title, and finally settle the matter. For this reason, we think it proper to try the question by ejectment.

Lewis and *Wilcocks* said, the practice in the supreme court had been conformable to the opinion of the President here.

Cooper *v.* Coats.

Costs.

On a bond for 600*l.*, judgment had been confessed by warrant of attorney; but previous to entering judgment, the amount due had been reduced by payments, to less than 10*l.* · *Held*, that the plaintiff was not entitled to costs, under the act of 1745.

A bond and warrant to confess judgment had been executed by the defendant for 600*l.* Before the judgment was entered up, he had paid so much

---

(*a*) See Phillips *v.* Clarkson, 3 Yeates 128; Hazlehurst *v.* Kenrick, 6 S. & R. 446; Pollard *v.* Shaffer, *ante*, p. 210.[1]

[1] To the same effect see Dewey *v.* Dupuy, 18; Frank *v.* Maguire, 42 Id. 77; Kuper *v.* Booth, 10 W. N. C. 79. 2 W. & S. 553; Ghegan *v.* Young, 23 Penn. St.

of the money as reduced the sum really due to less than 10*l.* And the question stated for the opinion of the court, was, whether the plaintiff should be allowed costs?

*309] **Hallowell* and *S. Levy* urged, that this was the case of a bond with a warrant of attorney, upon which they could not have confessed judgment before a justice; that a justice could not have taken cognisance of a set-off exceeding 10*l.*; and that the penalty of a bond was intended to cover the interest and costs; so that, even for the surplus, it was necessary in England to seek for relief in a court of equity.

Sergeant, contrà.—Where the sum is under 5*l.*, the act of 1745, 1 State Laws 204, meant to give full jurisdiction to the justices, except in certain enumerated cases; and the same jurisdiction is afterwards extended to sums under 10*l.* by reference to that act. The expressions of the legislature are, "that all actions for debt or other demand for the *value* of 40*s.* and upwards, and not exceeding 5*l.*, &c., shall be cognisable before any justice, &c.," which word *value* must intend something more than a penalty; for the penalty of a bond, being generally double the sum due, would exceed 10*l.* although the *value* of the debt might be less. In the present instance, judgment is taken only for 7*l.* Debt upon a bond for the payment of money is within the jurisdiction of the justices; but if the opposite construction were to prevail, the act, which was framed to save costs, might in almost every case of a bond be defeated. This is not like a set-off, which we might defalk or not, as we pleased; and, as to its being the case of a judgment confessed by warrant, that will be no recommendation to the favor of the court.

Shippen, President.—In the case of a set-off, this rule, with respect to costs, would be subject to great inconvenience, for, as it happened this term, in *Coxe* v. *Bolton*, a set-off of 60*l.* might be given in evidence, though the plaintiff could never bring the matter to a trial before a justice; as it was not in his power to say, whether the defendant would resort to an action, or take advantage of the defalcation.

The opinion of the Court was afterwards delivered to the following effect:

Shippen, President.—We think this case comes within the express words of the act of assembly, declaring that costs shall not be recovered; and there is no evidence that the plaintiff has entitled himself to the benefit of the exception, by filing a previous affidavit of his belief that the debt exceeded 10*l.*

It is not our meaning, however, when an action is brought for a sum above 10*l.* and the defendant reduces it to less by a set-off, which he might, or might not, have pleaded, that, in such a case, the plaintiff is not entitled to costs. The reason and justice of the thing would then be clearly in his favor.

Judgment for the plaintiff, but without costs.(*a*)

(*a*) The question of the right to costs in actions instituted in the common pleas, or district courts, where the plaintiff recovers less than the amount requisite to give those

courts jurisdiction, being still unsettled, it may be useful, in this place, to examine the authorities upon the subject.

The earliest reported case is that in the text; which was decided under the act of 1745, most of the provisions of which, and in many passages, its express words, are retained in the acts of 1804 and 1810, under which the other cases were generally determined. The act of 1745 provided (§ 13), that if any person should commence or prosecute any suit made cognisable before a justice, in any other manner than was directed by the act, and should recover less than 5*l.* (without having previously filed an affidavit in the prothonotary's office, of his belief that the cause of action exceeded 5*l.*), he should not recover any costs in such suit. By an act passed on the 23d of September, 1784, the jurisdiction of justices was extended to debts and demands, not exceeding 10*l.* The case of Cooper *v.* Coats decided, that where a debt was reduced by *direct payments* to a sum within the jurisdiction of the justice, costs could not be recovered, without a previous affidavit; but a distinction was taken between such reduction and that produced by a set-off. The same decision was made in the supreme court, in Bunner *v.* Neil, *post*, 457, where there is a very short note of the point decided. The next case was Brailey *v.* Miller, reported in 2 Dall. 74; where the claim of the plaintiff was for a debt amounting to 20*l.*; but on a reference, the defendant made a set-off, and the report was for only 8*l.* The plaintiff not having made the requisite affidavit, a question arose whether he was entitled to costs. The court (of common pleas) held that he was, on the ground that the provision of the act did not extend to the case of a set-off; President Shippen saying—"The demand in the present case was ostensibly above 10*l.*; though it was in the power of the defendant either to reduce it, or not, by setting up his counter-claim. The plaintiff could not, therefore, sue before a justice, because the defendant might there lie by; and if afterwards he was liable to be defeated in the common pleas, he would in fact be punished in costs, for resorting to the only court in which his action could be maintained." The practice was in conformity with this decision, and no case upon the subject appears in the reports until 1816, when Spear *v.* Jameson (2 S. & R. 530) was determined by the supreme court. In the meantime, the jurisdiction of justices of the peace had been gradually enlarged from 10*l.* to 20*l.*, and from that sum to $100. The case of Spear *v.* Jameson had been commenced in 1809, when the act of 1804 was in operation, the provisions of which were very similar to those of the act of 1745. Chief Justice Tilghman, in delivering the opinion of the court in favor of the plaintiff's right to costs, said, "It is well settled, that although the plaintiff does not recover more than $100, he shall have his costs, if he had a good cause of action for more than $100, which was reduced to $100 or less, by a *set-off*." The act of 1810, which, although passed previously to the decision in this case, could not operate upon it, contained a novel provision with respect to the right of set-off. The seventh section declared, "that a defendant who shall neglect or refuse, in any case, to set off his demand, whether founded on bond, note, penal or single bill, writing obligatory, book account, *or damages* on assumption, against a plaintiff, which shall not exceed the sum of one hundred dollars, before a justice of the peace, shall be and is hereby for ever barred from recovering against the party plaintiff, in any after-suit." It is evident, that this provision was intended to affect the question of costs in suits brought otherwise than before a justice. The first case in which it received a construction, was Sadler *v.* Slobaugh, 3 S. & R. 388. The plaintiff, in the court below had brought debt on a single bill for $100, the price of a horse sold by him to the defendant, and the debt, including interest, would have amounted to more than $100; but the defendant gave in evidence the plaintiff's warranty of the horse, and a breach of the warranty, in consequence of which the jury struck off part of the plaintiff's claim, and gave a verdict in his favor for $85. The plaintiff had not made the affidavit required by the act to entitle him to costs, and the question was, whether, under these circumstances, he was debarred from recovering them. The plaintiff's counsel relied on Brailey *v.* Miller as authority in his favor; but it was contended, on the other hand, that the seventh section of the act of 1810, made it imperative on the defendant to set off his defence before the justice, and therefore, the reason in Brailey *v.* Miller failed. Chief Justice Tilghman, however,

said, "The demand of the defendant against the plaintiff in this case was not for any certain sum of money. It might be for more than $100; but whether he should recover more or less than $100, would depend on the opinion of those who should decide the cause. It does not seem to be a case, therefore, within the meaning of the seventh section of the act." As, therefore, the defendant might have refused to make the set-off before a justice, he thought the case fell within the reason of Brailey *v.* Miller, and that the plaintiff was entitled to costs. Judge GIBSON, concurred in this judgment, but on the ground, that "the provision in the seventh section of the act of 1810, is applicable only to cases of defalcation of a *definite* sum, and that the law in all cases of *unliquidated* cross-demands, remains as it was before." It is not easy to reconcile the determination in this case, upon the reasons of either of the judges, with some other decisions of the same court. That the *demand* of the defendant, when he retains in his possession the article which was the subject of the warranty, could not, in any supposable event, exceed the original price of the article itself, is shown by the reasoning of the court in the case of Steigleman *v.* Jeffries, 1 S. & R. 478. There, the action was on a promissory note for the price of goods sold, to which the defendant offered evidence to prove a warranty by the plaintiff, and a breach of the warranty. C. J. TILGHMAN was of opinion, that the evidence was admissible, on the ground, that our defalcation act was extensive in its operations; and although, in Kachlin *v.* Mulhallon (2 Dall. 237), it had been held, that the right of set-off, under this act, did not extend to cases of unliquidated damages for any matter in nature of a *tort*, because in such case there is no standard by which the damages can be estimated, yet, he said, "In the present case, the objection is not so strong; the amount of damages, to be sure, cannot be reduced to a certainty, but the price agreed to be paid for the article purchased, is some rule to assist in making the estimate; it is a boundary beyond which the damages cannot be reasonably suffered to pass." Judge YEATES also distinguished between a defence arising from a warranty, and one sounding merely in *tort*. In the latter case, he said, "Individual feelings determine the *quantum* of compensation, without any known standard. That objection does not occur here." In Kline *v.* Wood (9 S. & R. 294), the question of jurisdiction, in the case of a warranty, was expressly decided. It was an action in the District Court of Philadelphia, on the warranty of a horse sold by the defendant to the plaintiff for $80, though the declaration averred, that the plaintiff had been put to expense in feeding and keeping the horse, to the amount of $150. The jury gave a verdict for the plaintiff for $40. Judge DUNCAN, in delivering the opinion of the court, said, "the action in the present case is clearly an action on the contract; and it is an action on the contract, where there is a measure of damages, namely, the difference between the value of a sound horse, and one with such defects as existed at the time of warranty." (p. 298.) "The legal cause of action was contract, and the law prescribed the rule, the estimate of the value between this horse in a sound and unsound state; which value could never exceed the price given for the horse." (p. 300.) Accordingly, it was held in this case, that the District Court had not jurisdiction of the action, it being within the cognisance of a justice of the peace. The reasons of Judge GIBSON also, in Sadler v. Slobaugh, seem unsupported, by the provisions of the act, or by the construction put upon it in other cases. The words of the clause are certainly broad enough to cover a claim of set-off for an unliquidated sum. A *demand* founded on bond, note, &c., or "*damages on assumption*," would seem intended for all cases of contract, whether the damages were definite or unliquidated. In fact, the court had expressly decided (in Sneively *v.* Weidman, 1 S. & R. 417), that under the words in the act of 1745, "actions of debt, and other demands," a justice of the peace had jurisdiction of an action for breach of warranty of a horse, where the damages sustained did not exceed the limit of his jurisdiction; and the Chief Justice there said, "The present action is founded on contract, and although the damages are uncertain, I think it must be included in the description, which ascertains the jurisdiction of justices of the peace. It cannot be said, that the word *demand* was intended to be restricted to cases in which a certain sum of money was demanded," &c.

The decision in the case of Sadler *v.* Slobaugh, however, has continued to govern the

practice, to the present time, The next case upon the subject of costs, is Stewart *v.* Mitchell (13 S. & R. 287), which occurred under precisely the same circumstances as Cooper *v.* Coats, and not being distinguished from it, the court determined that the plaintiff was not entitled to costs. In a very recent case (Grant *v.* Wallace, 16 S. & R. 253), the question again arose on the construction of the 7th section of the act of 1810, respecting set-off. The plaintiff brought suit in the common pleas, for a debt exceeding $100, without previously filing an affidavit. On the trial, a verdict passed for the plaintiff for a sum under $100, in consequence of a set-off by the defendant, but of what nature the report is silent. The court were divided in opinion on the right of the plaintiff to costs, Judges DUNCAN, ROGERS and TOD holding that he was entitled to them, while the Chief Justice delivered a contrary opinion. Judge TOD, who expressed the opinion of the majority, puts it upon the ground upon which Brailey *v.* Miller was decided, that where there is a set-off of any description, the plaintiff is entitled to his costs, although he has made no affidavit; and he relied upon the case of Sadler *v.* Slobaugh, decided, notwithstanding the act of 1810, as conclusive upon the point. The learned judge does not seem to have adverted to the circumstances of that case, or the reasoning of the court; otherwise, he would not have considered it as an authority in point. Whatever may be the value of that case, as a precedent, it certainly cannot be invoked as authority, beyond the mere question it decided, viz., that a defendant in an action before a justice, for the price of a chattel, cannot be compelled to set off a claim, arising from a breach of the warranty of such chattel; and therefore, that the plaintiff in such action has a right to costs in the common pleas, although he should recover less than $100, if his claim was reduced by such set-off. It seems to have been admitted by C. J. TILGHMAN, in that case, that where a defendant could be compelled to set off his demand, the plaintiff would be deprived of his costs, if he sued in the common pleas. It is difficult, therefore, to find any support for the decision in Grant *v.* Wallace, from the authority of Saddler *v.* Slobaugh. Chief Justice GIBSON, who dissented from the majority in Grant *v.* Wallace, expressed an opinion, that it was the intention of the legislature, by the provision in the act of 1810, to remove the difficulty as to costs, first suggested in Brailey *v.* Miller, and he thought the difficulty was effectually removed: "If the plaintiff," he said, "knows that there is a cross-demand for a sum certain, let him give credit for so much, and bring suit for the residue; and thus do for the defendant all that the defendant could do for himself. If the cross-demand be *unliquidated*, let him give credit for enough to give the justice jurisdiction, leaving the defendant to reduce it still lower, if he can, at the hearing. If, however, he shall believe the defendant not to be entitled to an allowance sufficient to reduce the demand to the limit of a justice's jurisdiction, he is then precisely in a condition to make the affidavit required by law, the effect of which is to entitle him to costs, no matter how small a sum he may recover." It is remarkable, that the Chief Justice here seems to consider an *unliquidated* cross-demand as one which the defendant might be compelled to set off; whereas, in Sadler *v.* Slobaugh, he expressly states, that he considers the provision of the act as inapplicable to such cases. He added also (16 S. & R. 256), that in the case of Patton *v.* Newel, decided in 1822, but not reported, the supreme court held, that the plaintiff was *not* entitled to costs, under similar circumstances.

The question of the right to costs, may, therefore, as we have said at the commencement of this note, be considered as yet unsettled. The truth is, that so many inconveniences present themselves, in carrying out the intentions of the legislature, that the courts have had great difficulties to surmount, and it is not surprising, that their decisions should be in some measure inconsistent with each other, as well as with the literal provisions of the acts of assembly. Perhaps, it would have been better, if the legislature had left it discretionary with the judges, to give or refuse costs to a plaintiff suing in the courts of record, where his standard is reduced below the standard of their jurisdiction, in consequence of a set-off.[1]

[1] The law is now settled, that when the plaintiff's recovery is reduced to less than $100, by a set-off, or equitable defence, he is entitled to costs, without a previous affidavit. Bartram

*Keely *v.* Ord *et al.*

Evidence.

Indebitatus assumpsit for goods, to wit, sixteen hogsheads of rum, sold and delivered. The plaintiff, by his books, and oath of his clerk, proved the sale to the defendants.

The defendants gave in evidence, that a certain George Henry was two-thirds owner of the cargo of which this rum was a part; and, in order to prove that the rum was purchased of George Henry, and not of the plaintiff, they offered to prove by Henry's clerk, that he had made a charge in Henry's books, by the direction of Henry, of the sale of the rum to the defendants.

To this, it was objected, that the books of Henry should be produced to show the entry; and that, otherwise, the evidence of the clerk to the contents of the books ought not be admitted.

And of this opinion was THE COURT; but, at the request of the counsel for the defendants, they reserved the point.(*a*)

Lynch *v.* Wood.

Costs of a commission.

Levy exhibited an account of expenses in the execution of a commission, which had issued for the plaintiff, *ex parte*, and moved that they might be allowed in the costs. Besides the charges for swearing the witnesses, and their attendance on the commissioners, there were charges for agency, and for the expenses of travelling to collect the testimony.

THE COURT allowed the charges for swearing the witnesses, and for their attendance; but rejected those for agency and travelling.

Hudson *v.* Howell.

Privilege of freeholders.

The privilege of freeholders to be sued by *summons* extends to actions of trespass *vi et armis*.

TRESPASS *vi et armis*. *Capias*, returnable to this term. *Howell* moved to quash the writ, the defendant being a freeholder.

Millegan objected, that this was a case excepted by the act; a *fine* being due to the commonwealth, upon the judgment *capiatur pro fine*, in actions *vi et armis*. But, by—

(*a*) See Kelly *v.* Holdship, 1 Bro. 36.

v. McKee, 1 Watts 38; Manning *v.* Eaton, 7 Id. 346; Odell *v.* Culbert, 9 W. & S. 66; Barry *v.* Mervine, 4 Penn. St. 330; Glamorgan Iron Co. *v.* Rhule, 53 Id. 93. And where the pleas are payment and set-off, the supreme court, on error, will presume that it was so reduced, the court below having given judgment for costs. Minick *v.* Minick, 33 Penn. St. 378. If, however, the recovery be so reduced by proof of actual payments, no costs are recoverable. Horrigan *v.* Insurance Co., 37 Leg. Int. 166. But though the plaintiff be not entitled to recover the costs of suit, for want of a previous affidavit, yet, the court having jurisdiction of the cause of action, he may collect the costs of an execution. Davenport *v.* Williams, 10 Phila. 574.

Hudson v. Howell.

SHIPPEN, President.—The practice has been long settled under this act. Unless it is a suit on a recognisance, or for a fine actually due to the state, we cannot take up a mere fiction, to defeat a positive privilege.

The writ quashed.(*a*)

(*a*) It has been held, however, that if a freeholder commit a trespass, jointly with one who is not a freeholder, he may be arrested upon a joint *capias* issued against both. Fife *v.* Keating, 2 Bro. 135. And see Jack *v.* Shoemaker, 3 Binn. 280.

SUPREME COURT OF PENNSYLVANIA.

JULY TERM, 1788.

Appeal of BROWN, executor of EDGAR.

Responsibility of executors.

Where one executor had received money belonging to the estate of the testator, and paid it over to his co-executor, who became insolvent; it was *held*, that though he would be chargeable, if there were *creditors*, and a deficiency of assets to satisfy them, yet, that he was not answerable to the *legatees*.

THIS was an appeal from the orphans' court of Philadelphia county, on the following case: Brown, having received 400*l.* on account of the estate of his testator, Edgar, paid it over (according to his uniform practice on such occasions) to his co-executor Dougherty. In Brown's books, this money was charged generally, as so much cash paid to Dougherty; but, in Dougherty's books, credit was given for it on account of the estate of Edgar. Dougherty became insolvent; and upon a settlement of Brown's administration, the orphans' court refused to allow him the 400*l.* thus paid over to his co-executor; but charged him with the principal sum, and interest from the time he received it, until the year 1776 (nine years), dropping the interest from that time until 1781, and afterwards reviving it.

It was argued in the January term, by *Wilcocks*, in support of the appeal, and *Lewis*, against it; when three points were made: 1st. Whether the money was a loan to Dougherty, or a payment to the estate of Edgar? 2d. Whether, if it was a payment to the estate of Edgar, Brown was thereby discharged? and 3d. Whether interest was payable to the residuary legatees, who were the appellees upon this occasion?

The Chief Justice, having stated the points that were made in the cause, now delivered the opinion of the court.

MCKEAN, Chief Justice.—From the evidence, we must determine, on the first point, that the money was a payment to the estate of Edgar. It was
*312] Brown's constant practice to transfer all his receipts *to Dougherty; and this sum of 400*l.* is credited to him in the accounts of the estate kept by the latter.

With respect to the second and third points, it must be observed, that the courts of chancery make it a general rule, that he who receives money should be answerable for it; and therefore, if one executor becomes insolv-

ent or bankrupt, the other shall not be charged. There is a difference, however, between legatees and creditors; the former being appointed, as well as the executor, by virtue of the testator's will; and consequently, cannot impose the same responsibility as the latter. The case in 1 P. Wms. 244, is the only one in point; but on that authority, and the justice of the matter itself, under all its circumstances, we are of opinion, that, although Brown would be chargeable, if there were creditors, and a deficiency of assets to satisfy them; yet, that he is not answerable to the legatees.(*a*)

The 400*l.* must, therefore, be deducted from the account, with the nine years' interest which is charged upon it. As to the rest, we think, Brown ought to be well satisfied to pay the interest; particularly, as it is not charged from the year 1776 to the year 1781.

The decision of the orphans' court was accordingly affirmed; deducting 400*l.*, and nine years' interest, from the account.

Shewell *v.* Wycoff.

Exceptions to award.

There was a report in this cause, and at the distance of a month after judgment *nisi* had been entered, the defendant filed reasons in exception to the report. But—

By the Court.—We must not sport with things of so solemn a nature as reports of referees, and verdicts of a jury. The exceptions are much too late. The rule is, that unless they are filed within four days, the judgment *nisi* becomes absolute.

Sergeant, for the plaintiff. *Bradford* and *Ingersoll*, for the defendant.(*b*)

(*a*) The distinction adopted in this case, between legatees and creditors, is said by Mr. Toller, in his Law of Executors, &c. (Mr. Ingraham's edition, p. 484), "to rest on no authority; the rule is general, that executors joining in a receipt, shall all be answerable." And see Mr. Cox's note to Churchill *v.* Hopson, 1 P. Wms. 241, the case cited by C. J. McKean in support of this distinction.[1]

(*b*) See Shoemaker *v.* Smith, 2 Binn. 239; Hamilton *v.* Gallagher, 4 Yeates 202; Davis *v.* Canal Co. 4 Binn. 296; Thellusson *v.* Cramond, 1 W. C. C. 319; Buckley *v.* Durant, *ante*, p. 129.

[1] Brown's Appeal is said, in Sterrett's Appeal, 1 P. & W. 421, to have been erroneously reported. Nevertheless, it appears to be settled, in this state, that between an executor and the legatees, a case is to be decided upon a more liberal view of his discretion, than as against creditors. Bruner's Appeal, 59 Penn. St. 46. And see McNair's Appeal, 4 Rawle 154, where the authorities upon this subject are collected by Judge Kennedy, with his customary exhaustive diligence. The conflict between the cases is referred to by Judge Lowrie, in Ducommun's Appeal, 17 Penn. St. 271. And see Bowker's Estate, 8 W. N. C. 493; Getz's Estate, 6 Id. 416; Lightcap's Estate, 27 Pitts. L. J. 201; s. c. 28 Id. 236.

Zane's executors *v.* Cowperthwaite, Sheriff.

Distringas.

A *distringas*, directed to the coroner, will lie against a sheriff *while in office*, to compel a sale of goods levied upon; but where the goods levied on had been taken out of the sheriff's hands by virtue of a replevin, the court, under the circumstances, quashed the *distringas*.

This cause had been argued in the last term by *Lewis* and *Ingersoll*, for the plaintiff, and *Rawle* and *Bowie*, for the defendant; and now the Chief Justice stated the question, and delivered the opinion of the court, in the following manner:

McKean, Chief Justice.—In this case, the executors of Zane had issued a *fieri facias* against Joseph Wharton, to which the present sheriff made return, that he had levied to the value of the plaintiff's demand, on specific goods, enumerated in a certain schedule. In consequence of this return, *313] a *distringas*, directed to the coroner, *was issued against the sheriff, to compel a sale of the goods; and the question that now awaits the determination of the court, is, whether a *distringas*, under these circumstances, will lie.

The case has been well argued: but we are surprised that so few authorities are to be found upon the subject. In searching the books of precedents, indeed, we have remarked, that the *distringas* uniformly runs against *A. B., nuper vice-comes;* though with this distinction, that, in some instances, it commands him to be distrained, until he pays the money into court, and in others, until the late sheriff has paid it over to the present sheriff. In 6 Mod. 295, Lord C. J. Holt says, that after the sheriff has made his return, "levied on specific goods," the regular mode of proceeding is to issue a *venditioni exponas*; that where he had returned "levied to the value," he is bound to sell without further process; and that it is usual to issue a *vend. exp.*, when the sheriff continues in office, but a *distringas* when he has left it. In the close of the same case, however, it is likewise Holt's opinion, that a *distringas* to the coroner will lie, even while the sheriff, who made the return, is in office. This we mention for the sake of the practice; for it is certain, that by the *fi. fa.* the sheriff has authority to sell the goods upon which he has levied; the *venditioni* only giving, by act of assembly, an additional authority in the case of lands.

But we have inquired into the practice of the courts upon this occasion; and we find, that it has been the practice of the common pleas, and in several instances, of the supreme court, to issue a *distringas* to the coroner where the sheriff has made a return of goods levied to the value: We are, therefore, of opinion that, in such a case, a *distringas* will lie.

A second point, however, was made in this cause. It appears, that a replevin for the goods in question, had issued to the coroner, and that by virtue of that writ, he had taken them out of the possession of the sheriff; so that the sheriff was unable either to produce them, or to proceed to a sale.

The replevin was highly irregular; an action of trespass being the proper remedy for a wrongful levy; for, by an act of assembly, it is expressly declared, that goods taken in execution shall not be replevied. (1 Sm. Laws, 470.)(*a*)

(*a*) See the note to Weaver *v.* Lawrence, *ante*, p. 156.

We think, therefore, that as the replevin would have been set aside, upon motion in the common pleas; and as the goods were taken from the sheriff, under color of law, it would be hard to issue a *distringas* against him, without a previous application to the court, and its being thereupon awarded. For this reason alone—

Let the *distringas* be quashed.

Williams *v.* Craig.

Evidence before referees.

A report of referees was set aside, because the referees allowed interest on an unsettled account, and allowed a charge of premium and commission for making insurance, without requiring the policy to be produced.[1]

This cause being referred, a report was made in favor of the plaintiff for a considerable amount, to which the following *exceptions were filed, and argued on the 12th of July, by *J. B. McKean*, *Lewis* and *Ingersoll*, for the defendant; and *Sergeant* and *Coulthurst*, for the plaintiff: [*314

1. That the referees heard the plaintiff's witnesses *ex parte*.

2. That they heard the plaintiff *ex parte*, without giving notice to the defendant.

3. That they allowed interest upon an unsettled account.

4. That they refused to allow a set-off.

5. That the defendant has discovered new and material testimony, since the report.

6. That the referees allowed a charge for premium and commissions in making an insurance for the defendant, without requiring the plaintiff to produce the policy, or having any other proof that the insurance was effected, than a letter from the plaintiff himself to his partner in Philadelphia, in which he says he has done it.

As the Chief Justice, in delivering the opinion of the court, adverted to those exceptions which were groundless or immaterial, and stated those particularly on which their decision was formed, I shall avoid recapitulating the arguments of counsel, and only subjoin the authorities on both sides.

McKean, Chief Justice.—There are four species of awards: first, those made by mutual consent, in pursuance of arbitration bonds entered into out of court; secondly, those which are made in a cause depending in a court of law or equity, upon the consent of the parties to refer the matter in variance (which are awards at common law); thirdly, those which are made under a rule of court, by virtue of the statute of 9 & 10 *Wm. III.*, *c.* 15, which was calculated to remedy the delay and circuity of action attendant upon awards made merely in pursuance of arbitration bonds, without the intervention of a controlling power, to compel the acquiescence of the parties. These are the only awards in use at this day, in England; but the legislature of Pennsylvania, in the year 1705, introduced another species here, which are, fourthly, those awards or reports that are made in pursuance of the act of

---

[1] See the remarks of Judge Brackenridge, dissenting from the views of Chief Justice McKean, in this case, in Mackie *v.* Pleasants, 2 Binn. 375,

assembly, setting forth, that "where the plaintiff and defendant consent to a rule of court for referring the adjustment of their accounts to certain persons mutually chosen by them in open court, the award or report of such referees, being made according to the submission of the parties, and approved by the court, and entered upon the record or roll, shall have the same effect, and be as available in law, as a verdict by twelve men." (Act of 1705, 1 Sm. Laws, 50.)(*a*)

This act differs essentially from the statute of *Wm. III.*, in many respects, but particularly, that to render a report or award, valid and effectual, the former requires, that it be approved by the court; but no such provision is made by the latter, and therefore, awards under rules of court, are conclusive in England, unless some corruption *or other misbehavior in the arbitrators is proved. The courts of equity, indeed, have taken a wider ground, and wherever a plain error appears, either in matter of fact or law, it seems, they will make it an object of inquiry (2 Vern. 705; 1 Id. 157; 3 Atk. 494). From some expressions in the authority, we might presume, that the error must be apparent on the award; but as the chancellor, at the same time, speaks generally, that it must be set forth in the bill for relief, there is, at least, great room to doubt upon the subject.

*315]

In Pennsylvania, however, since the revolution, as the approbation of the court is made a necessary ingredient in the confirmation of reports, we have thought it our duty, from time to time, to inquire into the allegations against them, before we gave them our sanction. But, in doing this, we have always confined ourselves to two points: 1st, Whether there is an evident mistake in matter of fact: or 2d, Whether the referees have clearly erred in matter of law.(*b*) If either of these is satisfactorily proved, the argument is, surely, as strong for setting a report aside, as where injustice has been done by the corruption or other misconduct of the referees.

Is it not reasonable, indeed, that the same cause which would induce us to set aside a verdict, and grant a new trial, should be sufficient for vacating an award? In the one case, the decision is made by twelve men, upon oath, with all the information which the judges, and learned counsel can communicate—in the other, it is the act of three persons, who are not sworn to the faithful discharge of their duty, and who are unassisted, either in ascertaining the law, or in developing the fact, upon which the question submitted to them may depend. This abundantly shows that the sacredness of awards ought not to be extended beyond that of verdicts; and must justify the court in putting them upon the same footing, when errors are suggested, either in clear points of law or fact.

If, therefore, we would have granted a new trial, had the present exceptions been made to a verdict, we ought, for the same reasons, to set aside the report in question.

Let us, then, consider the case upon its merits. The evidence has failed in establishing the first and second exceptions, which relate to the misconduct

---

(*a*) A fifth species of awards has been created by the act of 20th March 1810 (5 Sm. L. 131), which authorizes either party to refer a suit to arbitrators.

(*b*) This rule has since been recognised in many reported cases. See particularly Williams *v.* Paschall, 3 Yeates 569; Hurst *v.* Hurst, 1 W. C. C. 56; Large *v.* Passmore, 5 S. & R. 52.

of the referees; and with respect to the fourth and fifth, though the court incline to think that the arguments are in favor of the defendant, yet we do not find it necessary to give any opinion upon these, as we have no doubt, that, for the third and sixth reasons, the report ought to be set aside.

Thus, under the third exception, it has been proved by the statement exhibited by the referees, that interest was allowed to the plaintiff upon an unliquidated account; which is contrary to the general rule of law, as well as to the repeated decisions of this court. There are only three cases in which interest can be allowed upon an open account: 1st, where it is payable by the express agreement of the parties: 2d, where it is payable by a general usage, as in the trade between England and America, to which (with [*316 *an exception during the continuance of the late war) we have uniformly acceded: and 3d, where there has been a vexatious and unreasonable delay in making payment, which will induce the court to direct, and the jury to grant, an adequate compensation, under the name of damages, for which the rate of interest is generally made the rule of computation. The doctrine upon this subject was fully discussed and determined in *Henry* v. *Risk et al.*, *ante*, 265.(*a*) We think it establishes a just and useful principle, which tends equally to promote credit, and to prevent feuds and litigations. In transgressing this principle, the referees have mistaken a clear point of law, which would alone be sufficient for setting aside their report.

But besides this, we find by the evidence, under the sixth exception, that they have also allowed the charge of premium and commission for making an insurance, without requiring the policy to be produced, or any proof of its being lost; which is the only evidence that, in such cases, can be admitted in any court, either of civil or common-law jurisdiction. It is, indeed, a fundamental maxim in the laws of evidence (wisely framed for the prevention of frauds), that the best proof, of which the fact reasonably admits, ought to be given. This has not been complied with on the present occasion; and the referees, in overlooking it, have violated another plain principle of law.

Upon the whole, as our decision against the plaintiff can produce no material injury, but if against the defendant, would for ever preclude him from a chance of justice, the COURT unanimously direct—

That the report be set aside.

For the *plaintiff*, were cited: 5 Bac. 250; 1 Id. 134; 2 Burr. 701; Salk. 71, 73; 3 Burr. 1259; 2 Vern. 705; 1 Id. 157; Bull. N. P. 179, 180; 8 Vin. 61; 1 Atk. 67; 2 Vern. 706; 3 P. Wms. 25, 408; 3 Atk. 509.

For the *defendant*, were cited: 2 Vern. 515; 1 Atk. 64; 2 Vern. 705; 3 Atk. 494; 3 Burr. 1259; 5 Id. 2729; 1 Ld. Raym. 271; 12 Vin. 25, pl. 35; Cowp. 445; Doug. 627; 1 Show. 173; 1 Salk. 392; Gilb. L. Ev. 4, 5, 16, 17.

(*a*) See the note to Henry *v.* Risk, *ante*, p. 265.

PLOWMAN *v.* ABRAMS.

Justice's court.

After appeal from the judgment of a justice of the peace, and security duly given, if the appeal be not filed, the justice cannot issue execution against the original defendant, but must proceed against the bail.[1]

THIS was a *certiorari* to one of the justices of the city and county of Philadelphia, and the proceedings being returned, it appeared, that Plowman, the defendant before the justice, had appealed to the common pleas, and entered security, agreeable to the act of assembly; but on a certificate from the prothonotary of that court, that the appeal was not filed, the justice issued an execution against the defendant.

*317] *Dallas* moved to quash the execution. *Bankson* and *Heatly* opposed it. And—

BY THE COURT. After appeal and security given, the justice cannot issue an execution against the original defendant, but must proceed against the bail upon the recognisance. Therefore, let the proceedings of the justice be set aside, so far as respects the execution, with costs.

RICHETTE *v.* STEWART *et al.*

Evidence.

In an action on a policy of insurance, a *procès verbal* made by the master of the vessel (who was also a part-owner) on arriving at a French port, and delivered into the admiralty there, but not on oath, was *held* not to be admissible in evidence.

The protest of the master of a vessel must be made at the first port at which he arrives, unless under particular circumstances.

THIS was an action upon a policy of insurance on the brig La Catiche; and the circumstances of the case, so far as they respect the decision of the court, were these:—

The brig having sustained considerable damage by a storm, the master, who was also a part-owner, was compelled to deviate from his proper voyage, and accordingly, bore away for Cape François. When he arrived there, on the 28th day of August 1784, he delivered a *procès verbal* (which had been drawn up at sea, recently after the storm), into the admiralty, in order to obtain a survey of the vessel; but this instrument was merely a relation of facts, unattested by the oath of the master, or of any of the mariners who had subscribed it as witnesses. A copy of it being, afterwards, however, brought to Philadelphia, the master alone, on the 4th day of December 1784, went before a notary-public of that city, and in form of a protest, swore to the authenticity of the copy, and the truth of its contents.

When the present action was instituted, a commission issued to obtain a transcript of the proceedings in the Admiralty of Cape François; and the *procès verbal* being returned with the other official documents, certified by the judge, under the seal of that court, the plaintiff's counsel, at the trial, which came on the 4th of July, offered to read it in evidence to the jury.

---

[1] This case is provided for by the act of 1st April 1823, § 5 (8 Sm. Laws, 176), which authorizes the justice to issue an execution, if the appeal be not filed.

Richette v. Stewart.

But it was objected by the other side, that the *procès verbal*, taken by itself, was not admissible as evidence, because it had not been rendered upon oath; and that, even connecting it with the subsequent protest at Philadelphia, it ought, nevertheless, to be rejected; because no protest is valid to this purpose, that has not been made at the first port in which the master arrives, after a misfortune has happened to his vessel. See Westcott 432; 1 Magens 87; Beawes 140.

The plaintiff's counsel, in reply, observed, that although the strict formalities required in this country, had not been pursued, yet if the proceeding was conformable to the *lex loci*, it ought to be received. They contended, therefore, that as the *procès verbal* was lodged in a competent office, and is duly certified under the seal of the admiralty, this court, in respect to a foreign jurisdiction, is bound to presume that it was regularly taken according to the laws of France. Besides, the rule in regard to all exemplications, *rendered it necessary that the whole record should be transmitted and certified; and whatever may be its weight and effect, the whole ought also to be submitted to the jury. See Valin, Ord. de Fr. 190; Doug. 554. Park Insurance 404; Bull. N. P. 227. [*318

By the Court.—Though we had some doubt, at first, whether, connected with the subsequent protest, the *procès verbal* might not be given in evidence, yet we are now convinced, that its admission would be highly improper. The declaration of any man, delivered either in a Pagan or Christian court, without the solemnity of an oath, is not evidence of the fact asserted, even where the witness is subject to no bias; much less, where he is immediately interested; as the master was in the present instance, being a part-owner of the vessel.

The case in Doug. 554, does not apply to that before us; nor can the *procès verbal* be considered as a judicial proceeding. With respect to the argument, that it is a part of the exemplification, it is sufficient to observe, that if a deed of any kind had been left with the judge of the admiralty, he would, probably, have certified it in the same manner, without meaning in any degree to establish the validity, or to affect the legal operation of the instrument.

The reading of the *procès verbal* was accordingly overruled.

After stating some other points in the cause, the plaintiff's counsel offered to read the protest made in Philadelphia, on the 4th day of December 1784; to which their opponents likewise objected, for the reason already mentioned, that it was not made at the first port, and also, on account of the length of time which had intervened.

By the Court.—The question now before us, is, in fact, whether a protest must be made in the first port in which the master arrives after his vessel has been damaged? This is a matter of great importance, upon which little information can be derived from the books; and therefore, we were in hopes to have heard it more fully discussed on general principles.

We think, however, that to admit the evidence of a master of a vessel, in excuse of his own conduct, the greatest precaution should be used, and every possible restriction imposed. Hence, it is the rule in France, that

the protest shall be made within twenty-four hours after the arrival at the next port; and here, as well as in England, it ought to be accompanied by the attestation of a majority of the crew. See Valin, Ord. de Fr. 190; 1 Magens 160.

The reason is evidently to prevent any subsequent collusion; and we cannot but think that it is the safest as well as the most certain mode of proceeding. If, indeed, any particular circumstances should render it impossible to comply, they will always form an exception to the rule; but, as that is not pretended on the present occasion, we are unanimous in rejecting the evidence.(*a*)

As soon as this decision was pronounced, the plaintiff voluntarily suffered a nonsuit.

Levy, *Ingersoll* and *Sergeant*, for the plaintiff. *Lewis* and *Wilcocks*, for the defendants.

---

*319] *RESPUBLICA *v.* OSWALD.

Contempt.

It is a contempt, punishable by attachment, to publish remarks in a newspaper, which have a tendency to prejudice the public, with respect to the merits of cause depending in court.

ON the 12th of July, *Lewis* moved for a rule to show cause why an attachment should not issue against Eleazer Oswald, the printer and publisher of the Independent Gazetteer.

The case was this: Oswald having inserted in his newspapers several anonymous pieces against the character of Andrew Browne, the master of a female academy, in the city of Philadelphia, Browne applied to him to give up the authors of those pieces: but being refused that satisfaction, he brought an action for the libel against Oswald, returnable into the supreme court, on the 2d day of July; and therein demanded bail for 1000*l*. Previously to the return-day of the writ, the question of bail being brought by citation before Mr. Justice BRYAN, at his chambers, the judge, on a full hearing of the cause of action, in the presence of both the parties, ordered the defendant to be discharged on common bail; and the plaintiff appealed from this order to the court. Afterwards, on the first of July, Oswald published, under his own signature, an address to the public, which contained a narrative of these proceedings, and the following passages, which, I conceive, to have been the material grounds of the present motion.

"When violent attacks are made upon a person, under pretext of justice, and legal steps are taken on the occasion, not perhaps to redress the supposed injury, but to feed and gratify partisaning and temporising resentments, it is not unwarrantable in such person to represent the real statement of his case, and appeal to the world for their sentiments and countenance.

"Upon these considerations, principally, I am now emboldened to trespass on the public patience, and must solicit the indulgence of my friends

---

(*a*) In Boyce *v.* Moore, 1 Yeates 201; s. c. 2 Dall. 196; the court said, "We adhere to our determination in Richette *v.* Stewart," and accordingly reject a protest not made at the first port. See also the note to Nixon *v.* Long, *ante*, p. 6.

and customers, while I present to their notice, an account of the steps lately exercised with me; from which it will appear that my situation as *a printer, and the rights of the press and of freemen*, are fundamentally struck at; and an earnest endeavor is on the carpet to involve me in difficulties to please the malicious dispositions of old and permanent enemies.

"But until the news had arrived last Thursday, that the ninth state had acceded to the new federal government, I was not called upon; and Mr. Page, in the afternoon of that day, visited me, in due form of law, with a writ. Had Mr. Browne pursued me in this line, 'without loss of time,' agreeably to his lawyer's letter, I should not have supposed it extraordinary—but to arrest me the moment the federal intelligence came to hand, indicated that the commencement of this suit was not so much the child of his own fancy, as it has probably been dictated to and urged on him by others, whose sentiments upon the new constitution have not in every respect coincided with mine. In fact, it was my idea, in the first progress of the business, that Mr. Browne was merely the hand-maid of some of *my enemies [*320 among the federalists: and in this class, I must rank his great patron, Doctor Rush (whose brother is a judge of the supreme court): I think, Mr. Browne's conduct has since confirmed the idea beyond a doubt.

"Enemies I have had in the legal profession, and it may perhaps add to the hopes of malignity, that this action is instituted in the supreme court of Pennsylvania. However, if former prejudices should be found to operate against me on the bench, it is with a jury of my country, properly elected and impannelled, a jury of freemen and independent citizens, I must rest the suit. I have escaped the jaws of persecution through this channel, on certain memorable occasions, and hope I shall never be a sufferer, let the blast of faction blow with all its furies!

"The doctrine of libels being a doctrine incompatible with law and liberty, and at once destructive of the privileges of a free country, in the communication of our thoughts, has not hitherto gained any footing in Pennsylvania: and the vile measures formerly taken to lay me by the heels, on this subject, only brought down obloquy upon the conductors themselves. I may well suppose, the same love of liberty yet pervades my fellow-citizens, and that they will not allow the freedom of the press to be violated, upon any refined pretence, which oppressive ingenuity or courtly study can invent.

"Upon trial of the cause, the public will decide for themselves, whether Mr. Browne's motives have been laudable and dignified; whether his conduct, in declining an acquittal of his character in the paper, and suing me in the manner he did, was decent and consistent; and in a word, whether he is not actuated by some of my inveterate foes and opponents, to lend his name in their service, for the purpose of harassing and injuring me."

A transcript from the records was read, to show that the action between *Browne* and *Oswald* was depending in the court; James Martin proved that the paper containing Oswald's address was bought at his printing-office, fresh and damp from the press; and a deposition, made by Browne, was read, to prove the preceding facts relative to the cause of actior the hearing before Mr. Justice BRYAN, and the appeal from his order.

Lewis, then adverted to the various pieces, which were charged as

libellous in the depending action; and argued, that, though the liberty of the press was invaluable in its nature, and ought not to be infringed; yet, that its value did not consist in a boundless licentiousness of slander and defamation. He contended, that the profession of Browne, to whom the education of more than a hundred children was sometimes intrusted, exposed him, in a peculiar manner, to be injured by wanton aspersions of his character; and he inferred the necessity of the action, which had been instituted, from this consideration, that if Browne were really the monster which the papers in question described him to be, he ought to be hunted from society; but, that if he had been falsely accused, if he had been maliciously traduced, it was a duty that he owed to himself and to the *public to vindicate his reputation, and to call upon the justice of the laws, to punish so gross a violation of truth and decency. For this purpose, he continued, a writ had been issued, and bail was required. The defendant, if not before, was certainly, on the hearing at the judge's chambers, apprised of the cause of action; the order of Mr. Justice BRYAN on that occasion, and the appeal to the court, were circumstances perfectly within his knowledge; and yet, while the whole merits of the cause were thus in suspense, he thought proper to address the public in language evidently calculated to excite the popular resentment against Browne; to create doubts and suspicions of the integrity and impartiality of the judges, who must preside upon the trial; and to promote an unmerited compassion in his own favor. He has described himself as the object of former persecutions upon similar principles: he has asserted that, in this instance, an individual is made the instrument of a party to destroy him; and he artfully calls upon his fellow-citizens to interest themselves to preserve the freedom of the press, which he considers as attacked in his person. Nay, in order to cast an odium upon the new government of the United States, he insinuates, that his arrest was purposely protracted until the ratification of nine states had given stability to that system; a falsehood, as unwarrantable as it is insidious; for, it will be proved that this delay took place at his own request, communicated by Col. Proctor.

*321]

Col. Proctor, being examined on this point, said, that he, at first, desired the action might not be brought, in hopes of accomplishing a compromise between the parties; that, afterwards, he requested Mr. Lewis to defer issuing the writ until as near the term as it was possible: but that all this interference was of his own accord, and not at the instance of the defendant. He acknowledged, however, that he had informed Oswald, that the commencement of the action would be postponed as long as possible, after having obtained a promise to that effect from Mr. Lewis.

Lewis said, he was very much mistaken, indeed, if Col. Proctor had not mentioned the request as coming from the defendant; and Col. Proctor answered, "if ever I told you so, he certainly sent me; but I cannot remember that he ever asked me to do a thing of the kind."

Lewis then added, that the address to the public manifestly tended to interrupt the course of justice; it was an attempt to prejudice the minds of the people in a cause then depending, and, by that means, to defeat the plaintiff's claim to justice, and to stigmatize the judges, whose duty it was to administer the laws. There could be no doubt, therefore, that it amounted to a contempt of the court; and it only remained, in support of his motion, to

show that an attachment was the legal mode of proceeding against the offender. For this he cited 4 Black. Com. 280 ; 2 Atk. 469.

By the Court.—Take a rule to show cause on Monday next, at nine o'clock in the morning.

*The defendant appearing on Monday the 14th, agreeable to rule to show cause, obtained on Saturday, prayed that the rule might be enlarged, as he had not had a reasonable time to prepare for the argument. But *Lewis* opposed the enlargement of the rule, observing, that the defendant would be heard in extenuation or excuse of the contempt, after the attachment had issued. [*322

By McKean, C. J.—I know not of any instance where a delay of a term has been allowed, in the case of an attachment : one reason for such a summary proceeding is to prevent delay. Let cause be now shown.

Sergeant, in showing cause against the attachment, contended, that the doctrine in 4 Black. Com. 280, was laid down much too wide ; that in 2 Atk. 469, the chancellor expressly assigns this reason for his determining without a jury, that he was a judge of fact ; and in 1 Burr. 510, 513, an information is granted on this principle, that courts of common law will not decide upon facts, without the intervention of a jury.

McKean, C. J.—This was not the reason that influenced the court in their decision.

But, whatever the law might be in England, *Sergeant* insisted, that it could not avail in Pennsylvania. Even in England, indeed, though it is said to be a contempt, to report the decisions of the courts, unless under the *imprimatur* of the judges ; yet, we find Burrow, and all the subsequent reporters, proceeding without that sanction. But the constitution of Pennsylvania authorizes many things to be done, which in England are prohibited. Here, the press is laid open to the inspection of every citizen, who wishes to examine the proceedings of the government ; of which the judicial authority is certainly to be considered as a branch. Const. Penn. § 35.

McKean, C. J.—Could not this be done in England ? Certainly it could: for, in short, there is nothing in the constitution of this state, respecting the liberty of the press, that has not been authorised by the constitution of that kingdom for near a century past.

Sergeant.—The 9th section of the bill of rights, however, puts this supposed offence into such a form, as must entitle the defendant to a trial by jury ; and precludes every attempt to compel him to give evidence against himself. It declares, "that, in all prosecutions for criminal offences, a mar has a right to be heard by himself and his counsel, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favor, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury, he cannot be found guilty ; nor can he be compelled to give evidence against himself ; nor can any man be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers." Now, the present proceeding against the de-

fendant, is for a criminal offence; and, yet, if the attachment issues, the essential parts of this section must be defeated: for, in that case, the de-
*323] fendant cannot be tried by a jury; and, according *to the practice upon attachments, he will be compelled to answer interrogatories; in doing which, he must either be guilty of perjury, or give evidence against himself. The proceeding by attachment is, indeed, a novelty in this country, except for the purpose of enforcing the attendance of witnesses. Those contempts which are committed in the face of a court, stand upon a very different ground. Even the court of admiralty (which is not a court of record) possesses a power to punish them; and the reason arises from the necessity that every jurisdiction should be competent to protect itself from immediate violence and interruption. But contempts which are alleged to have been committed out of doors, are not within this reason; they come properly within the class of criminal offences; and, as such, by the 9th sect. of the bill of rights, they can only be tried by a jury.

McKean, C. J.—Do you then apprehend that the 9th sect. of the bill of rights introduced something new on the subject of trials? I have always understood it to be the law, independent of this section, that the twelve jurors must be unanimous in their verdict, and yet this section makes this express provision.

Sergeant said, that he had discussed the subject as well as the little opportunity afforded him would admit. He pressed the court to give further time for the argument, or, at once, to direct a trial. This he contended was, at least, discretionary; and, considering the defendant's protestation of innocence, (*a*) his readiness to give ample security for his future appearance, the magnitude of the question as arising from the constitution, and its immense consequences to the public, he thought a delay, that was essential to deliberation and justice, ought not to be refused.

Heatly and *Lewis*, in support of the motion, contended, that under the circumstances of the case, Oswald's publication, whether true or false, amounted to a contempt of the court, as it respected a cause then depending in judgment, and reflected upon one of the judges in his official capacity; that the argument of the adverse counsel went so far as to assert, there could be no such offence as a contempt, even in England, since the very words inserted in the constitution of Pennsylvania, were used in the *Magna Charta* of that kingdom; that, in truth, neither the bill of rights nor the constitution extended to the case of contempts, for they mean only to secure to every citizen the right of expressing his sentiments with a manly freedom, but not to authorize wanton attacks upon private reputation, or to deprive the court of a power essential to its own existence, and to the due administration of justice; that the court were as competent to judge of the fact and the law, upon the inspection of the publication in question, as the chancellor was, in the authority cited from Atkins; and that although the prosecutor could, perhaps, proceed either by indictment or information, yet
*324] that the abuses of the Star Chamber had rendered the process by information *odious, and an attachment, which was sanctified by im-

(*a*) Mr. Oswald repeatedly declared, that he meant no contempt of the court, in what he had published.

memorial usage, was the most expeditious, and therefore, the most proper remedy for the evil complaint of.

The Chief Justice delivered the opinion of the court to the following effect—Judge BRYAN having shortly before taken his seat.

McKEAN, C. J.—This is a motion for an attachment against Eleazer Oswald, the printer and publisher of the Independent Gazetteer, of the 1st of July last, No. 796. As a ground for granting the attachment, it is proved, that an action for a libel had been instituted in this court, in which Andrew Browne is the plaintiff, and Eleazer Oswald the defendant; that a question with respect to bail in that action, had been agitated before one of the judges, from whose order, discharging the defendant on common bail, the plaintiff had appealed to the court; and that Mr. Oswald's address to the public, which is the immediate subject of complaint, relates to the action thus depending before us.

The counsel in support of their motion, have argued, that this address was intended to prejudice the public mind upon the merits of the cause, by propagating an opinion that Browne was the instrument of a party to persecute and destroy the defendant; that he acted under the particular influence of Dr. Rush, whose brother is a judge of this court; and, in short, that from the ancient prejudices of all the judges, the defendant did not stand a chance of a fair trial.

Assertions and imputations of this kind are certainly calculated to defeat and discredit the administration of justice. Let us, therefore, inquire, first, whether they ought to be considered as a contempt of the court; and, secondly, whether, if so, the offender is punishable by attachment.

And here, I must be allowed to observe, that libelling is a great crime, whatever sentiments may be entertained by those who live by it. With respect to the heart of the libeller, it is more dark and base than that of the assassin, or than his who commits a midnight arson. It is true, that I may never discover the wretch who has burned my house, or set fire to my barn; but these losses are easily repaired, and bring with them no portion of ignominy or reproach. But the attacks of the libeller admit not of this consolation: the injuries which are done to character and reputation seldom can be cured, and the most innocent man may, in a moment, be deprived of his good name, upon which, perhaps, he depends for all the prosperity, and all the happiness of his life. To what tribunal can he then resort? how shall he be tried, and by whom shall he be acquitted? It is in vain to object, those who know him will disregard the slander, since the wide circulation of public prints must render it impracticable to apply the antidote so far as the poison has been extended. Nor can it be fairly said, that the same opportunity is given to vindicate, which has been employed to defame him; for, many will read the charge, who may never see the answer; *and [*325
while the object of accusation is publicly pointed at, the malicious and malignant author rests in the dishonorable security of an anonymous signature. Where much has been said, something will be believed; and it is one of the many artifices of the libeller, to give to his charges an aspect of general support, by changing and multiplying the style and name of his performances. But shall such things be transacted with impunity in a free

country, and among an enlightened people? Let every honest man make this appeal to his heart and understanding, and the answer must be—no!

What then is the meaning of the bill of rights, and constitution of Pennsylvania, when they declare, "That the freedom of the press shall not be restrained,"(*a*) and "that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government?"(*b*) However ingenuity may torture the expressions, there can be little doubt of the just sense of these sections; they give to every citizen a right of investigating the conduct of those who are intrusted with the public business; and they effectually preclude any attempt to fetter the press by the institution of a licenser. The same principles were settled in England, so far back as the reign of *William III.*, and since that time, we all know, there has been the freest animadversion upon the conduct of the ministers of that nation. But is there anything in the language of the constitution (much less in its spirit and intention) which authorizes one man to impute crimes to another, for which the law has provided the mode of trial, and the degree of punishment? Can it be presumed, that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred, by the authority of the constitution, when delivered to the public through the more permanent and diffusive medium of the press? Or, will it be said, that the constitutional right to examine the proceedings of government, extends to warrant an anticipation of the acts of the legislature, or the judgments of the court? and not only to authorize a candid commentary upon what has been done, but to permit every endeavor to bias and intimidate with respect to matters still in suspense? The futility of any attempt to establish a construction of this sort, must be obvious to every intelligent mind. The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society, to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity.

If, then, the liberty of the press is regulated by any just principle, there can be little doubt, that he who attempts to raise a prejudice against his antagonist, in the minds of those that must ultimately *determine the dispute between them; who, for that purpose, represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice—wilfully seeks to corrupt the source, and to dishonor the administration of justice.[1]

*326]

Such is evidently the object and tendency of Mr. Oswald's address to the public. Nor can that artifice prevail, which insinuates that the decision of this court will be the effect of personal resentment; for, if it could, every man could evade the punishment due to his offences, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion,

---

(*a*) Declar. of Rights, § 12.

(*b*) Const. of Penn. of 1776, § 35.

[1] See Const. of 1874, art. I., § 7. Commonwealth v. Singerly, 88 Leg. Int. 77; Commonwealth v. Willard, 9 W. N. C. 524 Commonwealth v. Woodward, 7 Lux. L. Reg. 39, 44.

because their treatment has been such as would naturally excite resentment in the human disposition. But it must be remembered, that judges discharge their functions under the solemn obligations of an oath; and, if their virtue entitles them to their station, they can neither be corrupted by favor to swerve from, nor influenced by fear to desert their duty. That judge, indeed, who courts popularity by unworthy means, while he weakens his pretensions, diminishes, likewise, the chance of attaining his object; and he will eventually find that he has sacrificed the substantial blessing of a good conscience, in an idle and visionary pursuit.

Upon the whole, we consider the publication in question, as having the tendency which has been ascribed to it, that of prejudicing the public (a part of whom must hereafter be summoned as jurors), with respect to the merits of a cause depending in this court, and of corrupting the administration of justice; we are, therefore, unanimously of opinion on the first point, that it amounts to a contempt.

It only remains then to consider, whether the offense is punishable in the way that the present motion has proposed.

It is certain, that the proceeding by attachment is as old as the law itself, and no act of the legislature, or section of the constitution, has interposed to alter or suspend it. Besides the sections which have been already read from the constitution, there is another section which declares, that "trials by jury shall be as heretofore;" and surely it cannot be contended, that the offence, with which the defendant is now charged, was heretofore tried by that tribunal.(*a*) If a man commits an outrage in the face of the court, what is there to be tried?—what further evidence can be necessary to convict him of the offence, than the actual view of the judges? A man has been compelled to enter into security for his good behavior, for giving the lie in the presence of the judges in Westminster Hall.

On the present occasion, is not the proof, from the inspection of the paper, as full and satisfactory as any that can be offered? And whether the publication amounts to a contempt, or not, is a point of law, which, after all, it is the province of the judges, and not of the jury, to determine. Being a contempt, if it is not punished immediatly, how shall the mischief be corrected? Leave it to the customary forms of a trial by jury, and the cause may be continued long in suspense, while the party perseveres in his misconduct. The *injurious consequences might then be justly imputed [*327
to the court, for refusing to exercise their legal power in preventing them.

For these reasons, we have no doubt of the competency of our jurisdiction; and, we think, that justice and propriety call upon us to proceed by attachment.

Bryan, Justice, observed, that he did not mean to give an opinion as to

---

(*a*) In Hollingsworth *v.* Duane (Wall. C. C. 77, 106), the circuit court of the United States held that a similar provision in the constitution of the United States did not deprive the courts of the right to punish contempts in a summary mode.[1]

[1] And see United States v. Hudson, 7 Cr. 32; United States v. New Bedford Bridge, 1 W. & M. 401.

the mode of proceeding; but added, that he had always entertained a doubt with respect to the legality of the process by attachment, in such cases, under the constitution of Pennsylvania.

McKean, C. J.—Will the defendant enter into a recognisance to answer interrogatories, or will he answer *gratis?*

Oswald.—I will not answer interrogatories. Let the attachment issue.(*a*)

McKean, C. J.—His counsel had better advise him to consider of it.

Sergeant said, that the defendant had not had time, even to peruse what had been sworn against him; for only Sunday had intervened since the obtaining the rule to show cause, and that was an improper day for applying to the records of the court.

McKean, C. J.—In criminal matters, Sunday has always been deemed a legal day.[1] There has been as ample time for consideration as could well be allowed; the term will end to-morrow. Will he answer, or not?

Sergeant prayed the court would grant until to-morrow morning to form a determination on the subject, and offered bail for the defendant's appearance at that time.

McKean, C. J.—Be it so. Let the bail be taken, himself in 200*l.*, and one surety in the like sum, for his appearance to-morrow morning.

The defendant appearing on the 15th of July, in discharge of his recognisance; the Chief Justice again asked, whether he would answer interrogatories or not?

Bankson, for the defendant, requested, that the interrogatories might be reduced to writing, before he was called upon to determine.

McKean, C. J.—Is that your advice to him? He must now say, whether he will answer them or not; they will be filed according to the usage of the court, and all just exceptions to them will be allowed.

Bankson.—He instructs me to declare that he will not answer interrogatories; and he then began to urge, that there was no contempt committed,
*328] but was told by the Chief Justice, that, as *that point had been determined by a unanimous opinion of the four judges yesterday, it was not now open for argument.[2]

Lewis said, that as a misrepresentation had been industriously spread abroad respecting the conduct of the court, he thought it proper, at this time,

---

(*a*) At this period of the cause, I am informed by a gentleman of great learning and accuracy, that the court called for the sheriff, in order to commit the defendant: but the transition from that idea to the advice which fell from the bench, must have been so instantaneous, that, if I heard that call, I presume, I did not consider it as a part of the proceedings, and therefore, omitted it in my notes. If it is of any importance, I am happy in the opportunity of supplying this defect.

[1] Proceedings for contempt are criminal in their character. Durant *v.* Supervisors, 1 Wool. 377

[2] Wartman *v.* Wartman, Taney, Dec. 362.

concisely to state the real nature of the present proceedings. It has been asserted, that the court were about to compel Mr. Oswald to convict himself of the offence with which he is charged; but the fact is this, that it is incumbent upon the person who suggests the contempt, to prove it by disinterested witnesses; and then, indeed, the defendant is allowed, by his own oath, to purge and acquit himself, in spite of all the testimony which can possibly be produced against him. It appears clearly, therefore, that Mr. Oswald's being called upon to answer interrogatories, is not meant to establish his guilt (for that has been already done), but to enable him to avoid the punishment which is the consequence of it. The court employ no compulsion in this respect. He may either answer, or not, as he pleases; if he does answer, his single oath, in his own favor, will countervail the oaths of a thousand witnesses; and if he does not answer, his silence corroborates the evidence which has been offered of the contempt, and the judgment of the court must necessarily follow.(*a*)

McKean, C. J.—Your statement is certainly right; and the misrepresentation which is attempted, must either be the effect of wickedness or ignorance.

Lewis now prayed, that the rule might be made absolute; but remarked, that, according to the authorities, the court might either do that, or, as the defendant was present, they might proceed at once to pass sentence upon him.

McKean, C. J.—There can be no occasion, when the party is present, to make the rule for the attachment absolute: the court will proceed to give judgment.

Bryan, Justice.—I was not here when the complaint was made to the court, when the evidence in support of the motion was produced, or the arguments against it were delivered; I consider myself, therefore, totally incapacitated for taking any part in this business.

Lewis.—We can immediately furnish the court with the proofs.

Bryan, Justice.—Can you furnish me, likewise, with Mr. Sergeant's arguments.

Lewis said, that he had not penetration enough to discover any argument in what had been said for the defendant; and having again read all the evidence which had been produced, he recapitulated what he had before said in support of the motion.

Page, the under-sheriff, was then called upon to prove, that the writ in the action of *Browne* v. *Oswald* had been in his possession, at least twelve days before it was served; and that the delay in serving it arose, at first, from the defendant's being at Baltimore; and afterwards, from his not being at home when the witness had repeatedly called upon him.

*Bryan, Justice.—I still say, that not having heard what has been offered in extenuation of the offence, I am incompetent to join in any [*329

(*a*) See Hollingsworth *v.* Duane, Wall. C. C. 78.

opinion respecting the punishment. I cannot surely be suspected of partiality to libellers; I have had my share of their malevolence. But it is true, I have not suffered much; for these trifles do not rankle in my mind.

The Chief Justice pronounced the judgment of the court in the following words:—

McKean, Chief Justice.—Eleazer Oswald: Having yesterday considered the charge against you, we were unanimously of opinion, that it amounted to a contempt of the court. Some doubts were suggested, whether, even a contempt of the court was punishable by attachment: but, not only my brethren and myself, but, likewise, all the judges of England, think, that without this power, no court could possibly exist—nay, that no contempt could, indeed, be committed against us, we should be so truly contemptible. The law upon the subject is of immemorial antiquity; and there is not any period when it can be said to have ceased or discontinued. On this point, therefore, we entertain no doubt.(*a*)

But some difficulty has arisen with respect to our sentence; for, on the one hand, we have been informed of your circumstances, and on the other, we have seen your conduct; your circumstances are small, but your offence is great and persisted in. Since, however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case.

Upon the whole, therefore, the Court pronounce this sentence:—That you pay a fine of 10*l.* to the commonwealth; that you be imprisoned for the space of one month, that is, from the 15th day of July to the 15th day of August next; and afterwards, until the fine and costs are paid. Sheriff, he is in your custody.(*b*)

(*a*) In Respublica *v.* Passmore, 3 Yeates 438, it was held, that a publication, attempting to prejudice the public mind on the merits of a suit pending at court, was punishable by attachment; and the defendant in that case was sentenced to fine and imprisonment. The power of the courts to punish in a summary way, for what are called *constructive contempts*, has since been taken away by the act of 19th April 1809 (5 Sm. L. 55), which restricts their power of summary punishment, to cases of "official misconduct of the officers of the courts, to the negligence or disobedience of officers, parties, jurors or witnesses, against the lawful process of the court, and to the misbehavior of any person in the presence of the court, obstructing the administration of justice." The act, however, declares that publications tending to bias the public mind respecting any question depending in court, may be punished by indictment, or by a civil action.[1]

(*b*) The sentence on the point of imprisonment, was entered upon the record for the space of one month, without taking notice of the explanatory words used by the court. At the expiration of the legal month (28 days), Mr. Oswald demanded his discharge; but with this, the sheriff, who had heard the sentence pronounced, refused to comply, until he had consulted the Chief Justice. His honor, remembering the meaning and words of the court, told this officer, at first, that he was bound to detain his prisoner until the morning of the 15th of August; but, having shortly afterwards examined the record, he wrote to the sheriff, that Mr. Oswald, agreeable to the entry there, was entitled to his discharge.

On the 5th of September 1788, Mr. Oswald presented a memorial to the General As-

[1] The case of Respublica *v.* Passmore led to an impeachment of the judges of the Supreme Court, on which they were acquitted. See Trial of the Judges, which contains an exhaustive review of the prior authorities on the question of contempts.

sembly, in which he stated the proceedings against him, complained of the decision of three of the judges of the court, in the principal case, and of the direction of the Chief Justice to the sheriff, by which, he alleged, his confinement had afterwards been illegally protracted—finally calling upon the house to determine, "whether the judges did not infringe the constitution in direct terms, in the sentence they had pronounced; and whether, of course, they had not made themselves proper objects of impeachment."

The assembly, having previously appointed a committee to report the order of proceeding on Mr. Oswald's memorial, resolved itself into a committee of the whole, to hear the evidence in support of the charges exhibited. Three days were consumed in the examination of witnesses, during which, the above report was substantially proved, together with the subsequent transaction relative to Mr. Oswald's imprisonment.

Mr. *Lewis*, as a member of the house, then delivered a very elaborate argument, in vindication of the conduct of the judges; and, though this is, in some degree, foreign to my immediate undertaking, it may not be unprofitable to those, who, either now or hereafter, wish to understand the principles of so interesting a case, to delineate the leading features of the doctrine which he maintained.

He began with stating the inestimable character of true liberty, which is equally endangered by tyranny on the one hand, and by licentiousness upon the other. He said, it did not consist in the uncontrolled power of doing whatever the will might prompt an individual to attempt; but, while it was independent of arbitrary and despotic rule, it was happily regulated by the laws and constitution of the state. Having rescued Sir William Blackstone from the stigma of being a *courtly* writer, by showing the enthusiasm of that author in favor of the trial by jury, Mr. *Lewis* referred to the celebrated Commentaries in support and illustration of his sentiments upon liberty. 1 Black. Com. 125; 2 Id.; 4 Id. 3, 42.

He then commented upon the origin, nature and purposes of a state of society, which, he said, was principally formed to protect the rights of individuals; and of those rights, he pathetically described the right of enjoying a good name, to be the most important and most precious. He observed, that the injuries which could be done to any other property, might be repaired; but reputation was not only the most valuable, but likewise the most delicate of human possessions. It was the most difficult to acquire; when acquired, it was the most difficult to preserve; and when lost, it was never to be regained. If, therefore, it was not as much protected as any other right, the aged matron, and the youthful virgin (since purity of character is the palladium of female happiness), while they are fettered by the habits and expectations of society, are exposed and abandoned by its laws and institutions. But this evil is effectually removed, when we consider the bill of rights as precluding any attempt to restrain the press, and not as authorising insidious falsehoods and anonymous abuse. The right of publication, like every other right, has its natural and necessary boundary; for, though the law allows a man the free use of his arm, or the possession of a weapon, yet it does not authorise him to plunge a dagger in the breast of an inoffensive neighbor.

Mr. *Lewis* then proceeded to consider the immediate subject of complaint. He stated it to be two-fold: 1st, That the Chief Justice had protracted Mr. Oswald's imprisonment beyond the legal expiration of his sentence: and 2d, That the imprisonment itself was unconstitutional, illegal and tyrannical.

On the first point, he observed, that it was, indeed, a serious charge, if Mr. Oswald could prove that a single justice had arbitrarily altered or counteracted the record of the court, in order to accomplish the imprisonment of a citizen. But how was the charge supported? The opinion given by the Chief Justice to the jailer, was not given in his judicial capacity; and though a paper, said to be a transcript from the records, was shown to him, yet it was not subscribed by the prothonotary, nor was it under the seal of the court. This, therefore, could not be a sufficient document to set aside his recollection of the sentence; it was no legal evidence of the fact which it stated (Gilb. Law of Ev. 23), and the little time that elapsed between the opinion given to the jailer, and the directions for Mr. Oswald's release, we may fairly presume to have been consumed in examining the records.

On the second point, he engaged in a long and ingenious disquisition upon the nature of what is called the liberty of the press; he represented the shackles which had been imposed upon it during the arbitrary periods of the English government; and thence deduced the wisdom and propriety of the precaution, which declares, in the bill of rights, that the press shall not be subject to restraint. He gave an historical narrative of the British acts of parliament and proclamations, which debarred every man of the right of publication, without a previous license obtained from officers established by the government to inspect and pronounce upon every literary performance; but observed, that this oppression (which was intended to keep the people in a slavish ignorance of the conduct of their rulers) expired in the year 1694, when the dawn of true freedom rose upon that nation. 9 vol. Stat. at Large, p. 190. Since that memorable period, the liberty of the press has stood on a firm and rational basis. On the one hand, it is not subject to the tyranny of previous restraints, and on the other, it affords no sanction to ribaldry and slander—so true it is, that to censure the licentiousness, is to maintain the *liberty* of the press. 4 Black. Com. 150, 151, 152. Here, then, is to be discerned the genuine meaning of this section in the bill of rights, which an opposite construction would prostitute to the most ignoble purposes. Every man may publish what he pleases; but it is at his peril, if he publishes anything which violates the rights of another, or interrupts the peace and order of society—as every man may keep poisons in his closet, but who will assert that he may vend them to the public for cordials? If, indeed, this section of the bill of rights had not circumscribed the authority of the legislature, this house, being a single branch, might, in a despotic paroxysm, revive all the odious restraints which disgraced the early annals of the British government. Hence, arises the great fundamental advantage of the provision, which the authors of the constitution have wisely interwoven with our political system; not, it appears, to tolerate and indulge the passions and animosities of individuals, but effectually to protect the citizens from the encroachments of men in power.

It has been asserted, however, that Mr. Oswald's address was of a harmless texture; that it was no abuse of the right of publication, to which, as a citizen, he was entitled; and, in short, that in considering it as a contempt of the court, the judges have acted tyrannically, illegally and unconstitutionally. But let us divest the subject of these high-sounding epithets, and the reverse of this assertion will be evident to every candid and unprejudiced mind: for such publications are certainly calculated to draw the administration of justice from the proper tribunals; and in their place to substitute newspaper altercations, in which the most skilful writer will generally prevail against all the merits of the case. But it is moreover the duty of the judges to protect suitors, not only from personal violence, but from insidious attempts to undermine their claims to law and justice. Hence, Lord Chancellor Hardwicke (who was an ornament to his country, and not one of whose decrees, during the period of twenty years which he sat as Chancellor, was ever reversed) has described three sorts of contempts—1st, Scandalizing the court itself: 2d, Abusing parties who are concerned in causes there; and 3d, Prejudicing mankind against persons, before the cause is heard. 2 Atk. 471. And in 2 Vesey 520, though no reflection was cast upon the court, and the offender pleaded ignorance of the law, yet, it is expressly laid down, that ignorance was not an excuse, and that the reason for punishing was, not only for the sake of the party injured, but also for the sake of the public proceedings in the court, to hinder such advertisements, which tend to prepossess people as to those proceedings. A similar doctrine is maintained in 1 P. Wms. 675. And 4 Black. Com. 282, pronounces the printing, even true accounts of a cause depending in judgment, to be a contempt of the court.

But it has been said, that this cause was not depending in court, when the offence was committed, because the address was published on the first of July, and the writ against Mr. Oswald was not returnable until the succeeding day. This idea originates in an ignorance of the constitution of our courts, which, in this respect, differs essentially from the constitution of the courts of England. There, all original process issues out of the court of Chancery, and is made returnable into the King's Bench or Common Pleas; so that, in truth, the writ gives the jurisdiction, and of course, until it is returned, the

court cannot take cognisance of the cause. Here, however, the original process issues out of the very court into which it is returnable, and is usually tested the last day of the preceding term. It is absurd, therefore, to say that the jurisdiction of a court, by whose authority a suit is actually instituted, can be thus suspended and parcelled out.

With respect to the address itself, Mr. *Lewis* analysed its offensive parts, in order to show that it treated the judges with indecent opprobrium; that, in some respects, it was inconsistent with truth, and that, in its general operation, it was intended, and could not fail, to excite resentment against Browne, the plaintiff, and compassion for Oswald, the defendant in the cause.

He now proceeded to consider the mode of punishment, which formed a material part of Mr. Oswald's complaint, and in support of its legality, referred, generally, to the authorities which he had already cited. He observed, that much declamation had been wasted upon this topic; and that the proceeding by attachment had been vehemently reprobated as the creature of the Star Chamber. Though that court might have employed the process of attachment (of which however he did not recollect an instance), yet, he insisted, that it was idle and absurd to consider it as the creature of a jurisdiction, whose own existence was of a much later date, than that of the subject to which we are told it gave birth. To prove this, he stated that the court of Star Chamber was not instituted until the year 1368, that *Magna Charta* was confirmed, at least, 113 years before that time; and, as all the authorities concur in declaring that the process by attachment is as ancient as the laws themselves, and that it was confirmed by *Magna Charta*, its origin is consequently long antecedent to that of the court of Star Chamber. 4 Black. Com. 280, 281, 282, 283, 284, 285.

But he argued, with great strength and perspicuity, that the process of attachment, which in practice was multiplied into innumerable uses, was essential to the administration of justice; and that if the exercise of this power was suppressed, the courts themselves might as well be annihilated. He represented, that it was an established principle in law, that one court could not punish a contempt committed against another, then, continued he, how shall the common pleas repel an injury of that nature? It is not vested with any criminal jurisdiction; it cannot impannel a grand jury, nor try an indictment; the only remedy, therefore, which the case can admit, is by an attachment. He applied the same reasoning to the supreme court; and with respect to the orphans' court, the court of admiralty, and the courts of the registers of wills, &c., he observed, that their proceedings, according to the civil law, were totally independent of juries; and that, consequently, if they were deprived of the process of attachment, it was in vain for them to decide and to decree, for they would then be without any means to enforce obedience to their decisions and decrees. Nay, he added, that, without this power, the legislature itself would be exposed to wanton insult and interruption;[1] and that letters, such as he had received, menacing his existence for his conduct on the present occasion, might be written and avowed with absolute impunity. He then enumerated many instances in which gross injustice would take place, but for the intervention of this summary proceeding. Where a sheriff refuses or neglects to return a writ; or to pay money which he has received upon an execution; where an inferior court refuses to transmit a record; a witness or juryman to attend or to be sworn; and where a defendant in ejectment refuses to pay costs, after a nonsuit, for want of a confession of lease entry and ouster—in all these, and many other cases, he demonstrated, that the great, efficient remedy, was by an attachment to be issued against the delinquent.

In tracing the antiquity of the process by attachment, he remarked, that it was admitted to be a part of the common law, by the most authoritative writers; and that the common law was a compound of the Danish, Saxon, Norman, Pict, and civil law. 1 Black. Com. 63. As, therefore, the attachment is derived from the civil law, and the civil law was introduced into England by the Romans, early in the first century,[2] he

[1] See Anderson *v.* Dunn, 6 Wheat. 204; Ex parte Nugent, 1 Am. L. J. 107; Kilbourn *v.* Thompson, 103 U. S. 168.

[2] See Finlason's Introduction to Reeves' Hist. of the English Law.

thought it impracticable at this day to ascertain its source; but insisted, that enough appeared, to prove it to be of immemorial usage, and a part of the law of the land.

He then adverted to the leading objection made by the advocates for Mr. Oswald, that, however the process of attachment might be legal in England, it was not so in Pennsylvania. From a decision in the time of Judge Kinsey, he showed, that, before the revolution, an attachment had issued for a contempt, and that the party had, in fact, answered certain interrogatories filed by order of the court; so that, it only remained to inquire whether any alteration had been introduced by the constitution of the state. In the 24th sect. of that instrument, it is declared, that, "the supreme court, and the several courts of common pleas of this commonwealth shall, besides the powers usually exercised by such courts, have the powers of a court of chancery, so far as relates, &c." Now, as it appears by the case which occurred while Mr. Kinsey was chief justice, that the power of issuing attachments was usually exercised by the supreme court, so far from altering the law, this is a direct confirmation of the jurisdiction of the court; for the greater naturally includes the less; and if the court is vested with all its former powers, by what possible construction can we deprive it of this? But it is answered, that a section in the bill of rights provides, that "in all prosecutions for criminal offences, the trial shall be by jury, &c." True, but the whole system must be taken together; or, if we examine a particular part, it must be with a recollection of the immediate subject to which that part relates. For otherwise, this very section might as properly be brought to prove, that the judges could not be impeached (since surely that is not a trial by jury), as that they have not the power of issuing attachments. All cases proper for a trial by jury, the bill of rights clearly meant to refer to that tribunal; but can anything more explicitly demonstrate, that the framers of the constitution were aware of some cases, which required another mode of proceeding, than their declaration, that "trials shall be by jury as heretofore?"—Who will assert that contempts were ever so tried? who will hazard an opinion, that it is possible so to try them?

But does not the constitution of Pennsylvania further distinguish between the laws of the land, and the judgment of our peers; furnishing a striking alternative, by the disjunctive particle *or*? This very sentiment, expressed in the same words, appears in the *Magna Charta* of England; and yet Blackstone unequivocally informs us, that the process of attachment was confirmed by that celebrated instrument. In the 14 chap. of *Magna Charta*, it is also said, that "no amercement shall be assessed, but by lawful men of the vicinage;" and who, that is at all acquainted with the law, or with the reason of the law, can think it possible, in that case, to pursue the generality of the expression?

From these analogous principles, therefore, and the construction of ages, we may safely argue on the present occasion. But the wild and hypothetical interpretations which some men have offered, would inevitably involve us in a labyrinth of error, and eventually endanger that liberty, which they profess, and every honest citizen must wish, to preserve.

As to the manner of proceeding upon the attachment, the court on this occasion have followed the precedent in Moseley's Rep. 250, where it is liberally said, that the defendant shall not be permitted to be examined to bring himself into contempt; but upon proof of the contempt, he shall be allowed to purge himself upon his oath.

Upon the whole, Mr. *Lewis* concluded, that the only grounds of impeachment, were bribery, corruption, gross partiality, or wilful and arbitrary oppression; and that as none of these had been proved, Mr. Oswald's memorial ought to be dismissed. He said, indeed, that it would be preferable to return to the state of nature, than to live in a state of society upon the terms which that memorial presented—terms, which left the weak and the innocent a prey to the powerful and the wicked; and which gave to falsehood and licentiousness, all that was due to freedom and to truth.

When Mr. *Lewis's* argument was closed, Mr *Findley*, a member from Westmoreland, rose, and delivered his sentiments, with great ability and precision. He acknowledged, that he had received great information and pleasure from the learned and eloquent

speech of the member who preceded him; but he thought it was unnecessary, upon the present occasion, to explore the dark and distant periods of juridical history. The rights and immunities which formed the great object of the revolution, he contended, were capable of an easy and unequivocal definition; they were not of such remote antiquity as to be lost, even to the feelings of the people; and the constitution of the state was the only proper criterion, by which they could be judged and ascertained. He did not, therefore, intend to pursue Mr. *Lewis*, in the track of legal disquisition; but, appealing confidently to the instrument itself, he deemed it to be his duty to pronounce, that the decision of the supreme court was a deviation from the spirit and the letter of the frame of government. In doing this, he observed, that he did not mean to assert, that any ground had been shown for the impeachment of the judges. But on the contrary, he agreed with Mr. *Lewis*, that bribery, corruption, or a wilful and arbitrary infraction of the law, were the only true causes for instituting a prosecution of that nature; and his candor readily induced him to believe, that as none of these had been proved, neither did any of them actually exist on this occasion. But, he said, it was due to the dearest interests of posterity, that the legislature should act with that circumspection, should decide with that wisdom, which, leading on the one hand, to an acquittal of the judges, did not tend, on the other, to establish a baneful and destructive precedent. It was in this point of view, that the present proceeding presented itself to his mind, as a matter of the greatest magnitude and importance; and he said, it were better far that Mr. Oswald had suffered in silence and obscurity, than that the attention of the legislature should be awakened, only to give additional strength and authority to the mistaken judgment of the court.

That it was a mistaken judgment, every man, he alleged, who possessed a competent share of common sense, and understood the rules of grammar, was able to determine, on a bare perusal of the bill of rights and constitution. With these aids, he defied all the sophistry of the schools and the jargon of the law, to pervert or corrupt the explicit language of the text; and therefore, he regretted, that in listening to the ingenuity of Mr. *Lewis's* paraphrase, his admiration was not necessarily followed by conviction.

He then discussed the 9th sect. of the bill of rights, which provides, "that in all prosecutions for criminal offences, a man hath a right to be heard by himself and his counsel, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favor, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury, he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land or the judgment of his peers." He said, that in these expressions, there was nothing ambiguous or uncertain; they contained a recapitulation of the most valuable privileges, in the most positive language; and they did not require to be illustrated or explained, by the Roman institutions, or the British practice. Hither, he observed, every man could safely resort, in order to be taught the nature and extent of his rights and obligations; and it would be fatal, indeed, to the cause of liberty, if it was once established, that the technical learning of a lawyer is necessary to comprehend the principles laid down in this great political compact between the people and their rulers. Even with respect to that clause on which the proceedings of the judges are particularly vindicated, he did not perceive a reasonable ground for the distinction that was attempted; but thought, with many other characters of superior information and abilities, that the law of the land was not, in fact, contradistinguished from the judgment of his peers, but merely a diversity in the mode of expressing the same thing. He admitted, however, that cases did exist in which it was necessary, for the sake of justice, to empower the judges to exercise a summary authority. For outrages committed in the face of the court, for the misconduct of its officers, and for a disobedience or resistance of its process, there seemed, he said, to be a propriety in establishing an immediate remedy. But this did not extend, in his opinion, to the case of constructive contempts; to criminal offences perpetrated out of the view of the court; nor to such acts, as in their nature, did not call for a sudden punishment,

and which, in their operation, involved a variety of facts, that a jury was only competent to investigate and determine.

With respect to the argument offered by Mr. *Lewis*, that all attachments had issued in Pennsylvania, before the revolution, and as the 24th sect. of the constitution declares, that the courts shall have all the powers which they usually exercised, therefore, the power of proceeding by attachment is confirmed, Mr. *Findley* observed, that the fallacy of this interpretation would be notorious, by recollecting that the last sentence of that very section stipulates, that such powers shall not be inconsistent with the constitution. Nor would he admit the inference which had been drawn from the next section, that says, "trials shall be by jury as heretofore;" for, he said, it appeared by its context and immediate subject, that it related to the forms and modes of proceeding upon the trial, and not to the cases in which the trial ought to be allowed.

Having expatiated, with great energy, upon the different points of the constitution, which the subject brought into view; having asserted the right of every man to publish his sentiments on public proceedings; and having urged the danger of permitting the judges, by implication, to punish for offences against themselves (observing, that if it was a contempt to write, it was also a contempt to speak of a cause depending in the courts), he concluded with intimating, that he should take an opportunity of submitting a resolution to the house, which might serve to avert the pernicious consequences of allowing the case of Mr. Oswald to grow into precedent.

Mr. *Fitzsimons*, a member from the city of Philadelphia, now moved the following resolution:

"Resolved, That this house having, in a committee of the whole, gone into a full examination of the charges exhibited by Eleazer Oswald, of arbitrary and oppressive proceedings in the justices of the supreme court against the said Eleazer Oswald, are of opinion, that the charges are unsupported by the testimony adduced, and, consequently, that there is no just cause for impeaching the said justices."

The proposition contained in this resolution, gave rise to a short but animated conversation. On the one hand, it was said, that in admitting that there was no ground of impeachment, it was not intended to concede, that the facts represented in the memorial had not been proved; and, on the other hand, it was answered, that, if there had been proof that the memorialist, according to the complaint, "was immured in prison, without even the shadow of a trial, for an imaginary offence," it would have been the indispensable duty of the legislature to vote for an impeachment. A compromise, at length, took place, and the committee of the whole agreed to report the following resolution:

"Resolved, That the charges exhibited by Mr. Eleazer Oswald against the justices of the supreme court, and the testimony given in support of them, are not a sufficient ground for impeachment."

But when this report was called up for the decision of the house, it was postponed (and consequently lost), on motion of Mr. *Clymer*, in order to introduce the resolution originally proposed by Mr. *Fitzsimons* in the committee. Mr. *Findley* then claimed the attention of the members, and after a judicious introduction, presented the following resolutions to the chair, to supersede Mr. *Clymer's* motion:

"Resolved, That the proceedings of the supreme court against Mr. Eleazer Oswald, in punishing him by fine and imprisonment, at their discretion, for a constructive or implied contempt, not committed in the presence of the court, nor against any officer, or order thereof, but for writing and publishing, improperly or indecently, respecting a cause depending before the supreme court, and respecting some of the judges of said court, was an unconstitutional exercise of judicial power, and sets an alarming precedent of the most dangerous consequence, to the citizens of this commonwealth.

"Resolved, That it be specially recommended to the ensuing General Assembly, to define the nature and extent of contempts, and direct their punishment."

An interesting debate arose upon these resolutions, in the course of which, much that had been said in the committee was repeated, and many new ideas were suggested, upon the general question of the jurisdiction of the court in cases of attachment. With respect to Mr. *Findley's* propositions, that gentleman ably supported them upon the spirit

*Lesher *v.* Gehr.

Execution.

Where the *venue* was laid in Philadelphia, it was held, that an execution could not issue into Bucks county, without a *fi. fa.* previously issued and returned in Philadelphia.

The *venue* in this case was laid in Philadelphia, and judgment being entered, an execution was thereupon issued immediately into Bucks county.

Sergeant obtained a rule to show cause why the execution should not be quashed, alleging that it ought to have been preceded by a *fi. fa.* in the county where the *venue* was laid, in order to ground a *testatum* into Bucks.

Levy, in showing cause, contended, that the act of assembly had departed from the practice in England; and that in directing a [*331 *testatum*, it referred only to the courts of common pleas, which are limited in jurisdiction to a single county. That the same act established the jurisdiction of the supreme court, and made it co-extensive with the state; and that, therefore, as the legislature was silent with respect to issuing a *testatum* from this latter court, it was fairly to be inferred, they did not mean to require it. He further insisted, that the practice supported his construction, and that a deviation *from it would be attended with great delay [*332 and injustice; for, when the act was passed, although a *testatum* might issue in three months from a court of common pleas, it must have been suspended for six months in the supreme court; and thus a debtor would have it in his power to give an unfair preference to creditors in the county where he lives.

Sergeant, in reply, stated, that the supreme court has powers similar to the courts of King's Bench and Common Pleas in England, and that the course of practice, with respect to a *testatum*, had always *been the [*333 same. But he contended, that unless the act of assembly had expressly extended the power to the county courts, they could not have proceeded by *testatum*, to execute out of their immediate jurisdiction; which is the true reason why the legislature takes notice of the writ in one case, and not in the other.

Upon a question from the court, Mr. *Burd*, the prothonotary, said, that previously to the revolution, the proceeding, in such cases, had always been by *testatum*; though since that period, a different practice had been introduced by some of the attorneys, contrary to his opinion.

---

of the constitution, and the expediency of the thing itself. But it seemed to be satisfactorily answered by Mr. *Lewis:* 1st, That the legislative power is confined to making the law, and cannot interfere in the interpretation; which is the natural and exclusive province of the judicial branch of the government; and 2d, That the recommendation to the succeeding assembly would be nugatory; for the courts of justice derive their powers from the constitution, a source paramount to the legislature; and, consequently, what is given to them by the former, cannot be taken from them by the latter.

Mr. *Findley's* motions were lost, by a considerable majority; and Mr. *Clymer's* revived resolution, adopted by the house: Yeas 34. Nays 23.

Respublica v. Teischer.

*By the Court.—The legislature, before the revolution, prescribed no rules for the supreme court; but it is certainly vested with the powers of the King's Bench and Common Pleas in England; and the practice has been, in general, governed by the same law. Hence, we find, that it was formerly thought necessary to proceed by *testatum* in Pennsylvania; and although a contrary practice has lately obtained, it is without the opinion or sanction of the court.

We think, therefore, that this execution must be quashed; and in every future case of the same kind, let a *fi. fa.* be filed in the supreme court, with a return of *nulla bona;* and then a term must intervene, before the *testatum* issues, in order to support the fiction.

The execution quashed.(*a*)

---

*335] *Respublica *v.* Teischer.

Indictment.

An indictment will lie, for maliciously, wilfully and wickedly killing a horse.

The defendant had been convicted in the county of Berks, upon an indictment for maliciously, wilfully and wickedly killing a horse; and upon a motion in arrest of judgment, it came on to be argued, whether the offence, so laid, was indictable?

Sergeant, in support of the motion, contended, that this was an injury of a private nature, amounting to nothing more than a trespass; and that to
*336] bring the case within the general rule of indictments *for the protection of society, it was essential that the injury should be stated to have been perpetrated *secretly*, as well as *maliciously;* which last, he said was a word of mere form, and capable of an indefinite application to every kind of mischief. To show the leading distinction between trespasses, for which there is a private remedy, and crimes for which there is a public prosecution, he cited Hawk. Pl. C. 210, lib. 2, c. 22, § 4. And he contended, that the principle of several cases, in which it was determined an indictment would not lie, applied to the case before the court. 2 Str. 793; 1 Ibid. 679.

*337] *The *Attorney-General* observed, in reply, that though he had not been able to discover any instance of an indictment at common law, for killing an animal, or, indeed, for any other species of malicious mischief; yet, that the reason of this was, probably, the early interference of the statute law to punish offences of such enormity; for that in all the precedents, as well ancient as modern, he had found the charge laid *contra formam statuti*, except in the case of an information for killing a dog—upon which, however, he did not mean to rely. 12 Mod. 337.

He said, that the law proceeded upon principle, and not merely upon precedent. In the case of *Wade*, for embezzling the public money, no pre-

---

(*a*) See Fulton *v.* Irwin, Addis. 19; Ewing *v.* McNair, 4 Yeates 192; s. c. 2 Dall. 169; Baker *v.* Smith, 4 Yeates 189; Cochrane *v.* Cummings, 4 Id. 136; Maybury *v.* Jones, 4 Id. 2[illegible], Green *v.* Allen, 2 W. C. C. 280; Cowden *v.* Brady, 8 S. & R. 505; and the act of April 1823 (8 Sm. Laws 175).

cedent was produced ;(*a*) and one *Henry Shallcross* was lately condemned, in Montgomery county, for maliciously burning a barn (not having hay or corn in it), though there was certainly no statute for punishing an offence of

---

(*a*) The following report of this case is derived from Mr. RAWLE's MSS.

COMMONWEALTH v. WADE. } Oyer and Terminer, Philadelphia, September 22d, 1786. Francis Wade was indicted for that he, on the 16th of April 1785, was appointed a signer of the bills of credit emitted by virtue of the funding act, and authorised and intrusted to number and sign such bills of credit as should be delivered to him; and so signed and numbered to redeliver to the treasurer; that the said Francis Wade afterwards, viz., on the 23d of April 1785, took upon himself the execution of the same office, and at divers times had and received from the treasurer 3400 sheets of the said bills of credit, amounting to the sum of 18,700*l.*; and the said Francis Wade was bound by the duty of the said office, the said bills to number and redeliver, &c.; but the said Francis Wade did not redeliver 2750*l.*, part of the same, but unlawfully, corruptly and fraudulently embezzled, and from the said treasurer withheld, and to his own use fraudulently disposed and converted the same, &c.: to the great nuisance of the commonwealth, in violation of the trust in him reposed, and against the peace, &c.

To this indictment, the prisoner demurred generally, and the Attorney-General joined in demurrer.

The case stood over from April 1786, to September 1786, and was now argued by *Sergeant*, for the prisoner, and *Bradford*, for the Commonwealth.

Mr. *Sergeant* objected that this was not an indictable offence. A civil action is now depending against Wade, and there are many instances of men making default in paying over public moneys, but there is no instance of an indictment. Co. Litt. 81. *Non-user* is an argument that an action does not lie. 4 Black. Com. 121. The first misprision is the mal-administration of public officers; and this, he says, is punishable by impeachment, not by indictment. Blackstone's law being much formed at the University, he is greatly inclined to the civil law, but he cites here the Julian code, which is a positive law. 31 *Eliz.*, *c.* 4. 1 Hawk. loco, Embezzlement. Now, if an indictment would lie at common law, for embezzling money, it might be supposed to lie also for embezzling the King's Armor, yet it appears by 4 Black. Com., that it became necessary to pass a statute for the purpose. So of the stat. 21 *Hen. VIII.*, relating to embezzlement by servants, which recites that it was doubtful at common law, whether embezzlement by the servant of a private man, amounted to felony. So of the stat. 7 *Jac. I.*, *c.* 17, respecting embezzlement by wool-combers. But no indictment, independent of express statutes, in England, can be shown for this offence. The acts formerly made for emitting paper money, provided security with respect to those intrusted with the charge of it. By the act of 1778, an oath was required. This shows that the legislature was of opinion, that an indictment did not lie at common law.

Mr. *Bradford* (Attorney-General), for the Commonwealth.—All violations of public property, all breaches of public trust, are indictable at common law. Thus, a nuisance; assisting a *servant* to run away, is not indictable; *secus*, of a prisoner of war, and it has been so determined in this court. 2 Hawk. 210, § 4. All capital crimes, all inferior crimes of a public nature, &c., are indictable; 1 Hawk. 198, § 4; so tender a regard for the King, and religion, has the law, that an indictment for either of them is good—an indictment for converting the King's money to his own use is maintainable. In Bucks county, one Petit was indicted for conspiring with others to feign a robbery; 2dly, simply for embezzling the public money; he was convicted on both counts, and punished by this court. 2 Roll. Ab. 83, § 1, a man may be indicted for keeping treasure trove; and on this authority, Blackstone builds, in vol. 4, p. 121, where he cites 3 Inst. 133: this is the case of a *private* person in possession of public money. *A fortiori*, where he is a public officer, and receives money in a public capacity. The stat. of 31 *Eliz.*, *c.* 4, does no more prove that embezzling was not indictable at common law, than the stat-

that description in Pennsylvania. The principle, therefore, is, that every act of a public evil example, and against good morals, is an offence indictable by the common law; and this principle affects the killing a horse, as much, at least, as the burning an empty barn.

But he contended, that there were many private wrongs which were punishable by public prosecution: and that with respect to these a distinction had been accurately established in 2 Burr. 1129, where it is said, that "in such impositions or deceits where *common prudence* may guard persons against the suffering from them, the offence is not indictable, but the party *338] is left to his civil remedy *for the redress of the injury that has been done him; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable." Accordingly, in Crown Circ. Comp. 231; 1 Str. 595; s. c. Crown Circ. Comp. 54, are cases of private wrongs, and yet punished by indictment; because, as it is said in Burrow, common prudence could not have guarded the persons against the injury and inconvenience which they respectively sustained. The same reason must have prevailed in an indictment at Lancaster (the draft of which remains in the precedent book of the successive attorney-generals of this state), for poisoning bread, and giving it to some chickens; and it applies in full force to the case before the court.

Independently, however, of these authorities and principles, the jury have found the killing to be something more than a trespass; and that it was done *maliciously*, forms the gist of the indictment; which must be proved by the prosecutor, and might have been controverted and denied by the defendant. Being therefore charged, and found by the verdict, it was more than form; it was matter of substance.

The opinion of the court was delivered on the 15th of July, by the Chief Justice.

McKean, Chief Justice.—The defendant was indicted for "maliciously,

---

utes making forgery capital, prove it was not indictable before. 1 Hawk. 167. In grant of every office, the condition of executing it faithfully is implied. The case of *Bembridge* (Annual Register 1783), was an indictment for being concerned in falsifying Lord Holland's accounts. In 1 R. R. 2, there is a case quoted by a judge of a person, receiving money for buying archery, &c. 14 Vin. 369.

Sergeant, in reply.—I shall produce the original authority on which all the subsequent *dicta* are founded, 27 Assis. 19, 20, where it appears that the case was adjourned. In 1 R. R. there was no judgment. Nor since *Edw. III.*, 400 years ago, do we meet with any instance of an indictment. A constructive offence is not consonant to the principles of our law. As to treasure trove, it was made an indictable offence from the difficulty of detecting it. So stealing horses, sheep, &c., 1 Hawk. 210, is also founded on a case not adjudged. *Petit's case*, in the first count, laid a false and fraudulent swearing, with the view to deceive the country; this too was an ingredient in *Bembridge's* case. 1 Hawk. 167, was the case of a public officer; but in the indictment it does not appear that anything was paid, or payable to the prisoner.

The Court, after advisement, intimated their opinion very clearly, that the indictment lay, but as it was understood, postponed giving judgment, that the defendant might settle, which it is believed he did.[1]

[1] And see Pennsylvania *v.* McGill, Addis. 21; Pennsylvania *v.* Gillespie, Id. 267; Campbell *v.* Commonwealth, 59 Penn. St. 266; Commonwealth *v.* McHale, 97 Id. 397.

wilfully and wickedly killing a horse;" and being convicted by the jury, it has been urged, in arrest of judgment, that this offence was not of an indictable nature.

It is true, that on the examination of the cases, we have not found the line accurately drawn; but it seems to be agreed, that whatever amounts to a public wrong may be made the subject of an indictment.(*a*) The poisoning of chickens; cheating with false dice; fraudulently tearing a promissory note, and many other offences of a similar description, have heretofore been indicted in Pennsylvania; and 12 Mod. 337, furnishes the case of an indictment for killing a dog—an animal of far less value than a horse. Breaking windows, by throwing stones at them, though a sufficient number of persons were not engaged to render it a riot; and the embezzlement of public moneys, have, likewise, in this state been deemed public wrongs, for which the private sufferer was not alone entitled to redress; and unless, indeed, an indictment would lie, there are some very heinous offences, which might be perpetrated with absolute impunity; since the rules of evidence, in a civil suit, exclude the testimony of the party injured, though the nature of the transaction generally makes it impossible to produce any other proof.

For these reasons, therefore, and for many others which it is unnecessary to recapitulate, as we entertain no doubt upon the subject, we think, the indictment will lie.

Let judgment be entered for the Commonwealth.(*b*)

---

*James v. Browne. [*339

Account-render.

In *account-render* between *partners*, it is sufficient to charge the defendants generally, with the receipt of money to their joint benefit; and if the plaintiff prove a receipt from any one of the persons mentioned in the declaration, he is entitled to a general verdict, on the issue of *ne unques receiver*.

This was an action of *account-render*, brought by one partner against another, and several issues were joined on the pleas, 1st, of *ne unques receiver*, and 2d, fully accounted. In the declaration, the plaintiff and defendant were named merchants, and the defendant was charged as a receiver of moneys to the joint benefit of the company, from three persons, and the proof was of a receipt from one of them.

For the *defendant*, it was contended, that as he had not been charged as bailiff, in order to make him accountable as receiver, it was incumbent upon the plaintiff to state in his declaration, by whose hands the moneys were received, and to prove, accordingly, a receipt by the hands of such person or persons. Bull. N. P. 121. That unless the proof went to all the persons stated in the declaration, he failed in his action; or, at least, that the verdict must be conformable to the evidence, which was only of a receipt by the hands of one, so that the judgment *quod computet*, pursuing the verdict, must be restricted to that receipt alone.

(*a*) S. P. Commonwealth *v.* Eckert, 2 Bro. 251, where it was held, that an indictment would lie, for unlawfully and maliciously "deadening and destroying" a tree, standing on public ground.

(*b*) See Respublica *v.* Sweers, *ante*, p. 41.

But it was answered, and so ruled by the COURT, in their charge to the jury, that however the law stood in the case of a common receiver, yet, as between copartners, the action of account-render would be nugatory, if the same doctrine prevailed. That in Pennsylvania particularly, where there is no court of chancery to compel a disclosure of the numerous and extensive transactions, which one partner might manage for the joint benefit of the company, there would be no remedy, unless this action were liberally extended. That between partners, therefore, it is sufficient for the plaintiff to charge the defendant, generally, with the receipt of the money to their joint benefit; and having proved a receipt by the hands of any one of the persons mentioned in the declaration, he is entitled to a general verdict upon the first issue.(*a*) Then, on the judgment *quod computet*, all the accounts between the parties will come before the auditors, without particular respect to the receipts proved upon the trial.

No evidence being offered by the defendant, in support of the second plea, the jury gave general verdicts for the plaintiff upon both issues; and thereupon, judgment *quod computet* was entered.

Afterwards, when the court were about to appoint auditors in this cause, the Chief Justice made the following observations:—

McKEAN, Chief Justice.—The necessity of a liberal extension of the action of account-render between joint partners, is apparent, not only from the nature of the case, but from this circumstance also, that the parties would otherwise be destitute of any means to arrive at justice; for the action on the case, though beneficially construed in modern practice, would certainly be inadequate; and we have no court of chancery to interpose an equitable jurisdiction. The action of account has, we know, been almost
*340] disused in England for a century *past; but this is owing to the greater facility of obtaining settlements in the court of chancery, by a reference to the masters; and there are many cases in the books which point out the expediency and propriety of the interference of that court. If, indeed, it had not assumed a competent jurisdiction in this respect, I am persuaded, that, in order to accomplish justice, the court of King's Bench would have done what we are now obliged to do. For it is the duty of judges to see the laws faithfully administered, and to promote the proper means for obtaining that end.

Hence it is, that here, in an action of account-render between partners, if these facts are proved—that a partnership existed; that the defendant was the acting partner; and that he received any part of the sum, from any of the persons mentioned in the declaration—we shall uniformly oblige him to render an account of his transactions. It would be hard, indeed, if, while the books and documents remain in the hands of the defendant, the plaintiff were bound to state in his declaration every receipt in which he was interested, and to be condemned to lose, under such circumstances, his portion of every credit he omitted to insert, in the course of a mercantile transaction, consisting, perhaps, of ten thousand items.

It should be observed, likewise, that there is a distinction in the general law as to bailiffs and receivers; the former being entitled to reasonable ex-

(*a*) See Jordan *v.* Wilkens, 2 W. C. C. 482.

penses, which the latter cannot recover. This distinction, however, does not apply to the case of partners in trade; for one partner, though charged as a receiver, is entitled to every just allowance against the other.

Nor does the verdict of the jury affect the principles of the settlement; for, suppose, I engage in trade with another man, and pay into his hands 1000*l*., as my share of the stock; if, afterwards, I bring an action of account-render against him, and the jury find the receipt of this money; such finding does not surely fix the sum for which he shall be responsible to me, but the auditors will, nevertheless, on the one hand, allow me a proportion of any profits which have been accumulated; or, on the other hand, charge me with a proportion of any losses or expenses that may have happened in our joint negotiations. Co. Litt. 172, § 259.(*a*)

Butcher *v.* Coats.

Costs of an attachment.

Two witnesses, who had been duly served with a *subpœna*, were brought before the court upon an attachment; but having satisfactorally proved, that they were so much indisposed, as to be utterly incapable of attending in obedience to the *subpœna*, they were discharged. And—

By the Court.—As we do not find these persons in contempt, the costs of the attachment must abide the event of the suit.(*b*)

(*a*) See Griffith *v.* Willing, 3 Binn. 317; Irvine *v.* Hanlon, 10 S. & R. 220; Whelen *v.* Watmough, 15 Id. 153; Gratz *v.* Phillips, 5 Binn. 568; Crousillat *v.* McCall, 5 Id. 433; s. c. 3 S. & R. 7.

(*b*) See Thomas *v.* Cummings, 1 Yeates 60.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

SEPTEMBER TERM, 1788.

MURDOCH *v.* WILL.

Responsibility of sheriff in replevin.

The sheriff is responsible for the sufficiency of the sureties in a replevin-bond; and the value of the distress is the measure of the damages, in a suit against him; the goods ought, therefore, to be appraised, before a delivery.

THIS was an action against the late sheriff, for taking insufficient sureties on a replevin-bond; and the PRESIDENT, in his charge to the jury, laid down the following positions.

1. That, as the law gives the remedy of a distress to a landlord, it is incumbent upon the sheriff to see that the security is good, before he returns the property on a replevin.

2. That evidence of a vague report of the surety's being in good circumstances is not sufficient to repel the proof made by the plaintiff, that his circumstances were bad at the time of the replevin.

3. That the value of the distress, at the time of the replevin, and not the amount of the rent due, is the proper measure of damages in this action.(*a*)

4. That, therefore, the goods distrained ought (although a contrary practice has prevailed) to be valued, before they are delivered on a replevin.

Verdict for the plaintiff for the value of the goods distrained.(*b*)

INGLES *v.* BRINGHURST.

Party-walls.

The claim for the moiety of the cost of a party-wall, is a personal charge against the builder of the second house, and not a lien upon the house itself.

INDEBITATUS *assumpsit* for money laid out and expended, &c. The case was this: The plaintiff, Ingles, had a house in the district of Southwark,

(*a*) But see Miller *v.* Foutz, 2 Yeates 419.

(*b*) See Oxley *v.* Cowperthwaite, *post*, p. 349.

against the wall of which one Waters had erected another house. Waters becoming insolvent, his house, on *the 1st of August 1774, was sold under a *venditioni exponas* to one Ridley; but he also falling into distress, the house, by virtue of a similar process against him, was again sold, on the 7th of March 1776, to the defendant, Bringhurst, for a full and valuable consideration. In the advertisements published on the occasion of these successive sales, no other incumbrance was mentioned, than a ground-rent of 6*l.*; and the defendant had remained in quiet possession of the premises, until about two or three years ago, when the plaintiff demanded of him one-half of the cost of the party-wall between the above-mentioned houses; and the demand being refused, he brought this action to recover the amount. [*342

The question, therefore, agitated on the trial, was, whether the claim for a reimbursement of a moiety of the cost of a party-wall, under the act of assembly (1 Sm. L. 125), was a lien upon the land, or only a personal charge against the builder of the second house?

The plaintiff called several witnesses (who had been regulators of considerable experience), in hopes of establishing a custom favorable to his pretensions. They only proved, however, that the valuation of a party-wall was never made, until the second house was built; and that, even afterwards, it was frequently postponed for four or five years. One of the witnesses, indeed, said, that he remembered an instance where the purchaser paid the moiety of the cost of the party-wall, and not the original builder of the second house; but he could not ascertain whether this was the effect of any agreement of the parties, or not.

The argument was conducted by *Levy*, for the plaintiff, and by *Tilghman* and *Hallowell*, for the defendant.

For the *plaintiff*, it was urged, that, in a variety of cases, the law favored and supported a usage in particular matters, even before it had attained all the characteristic qualities of a custom. Thus, the general rule of law entitles a lessee *pur auter vie* to emblements, but not a tenant for years; and yet, on the usage of a particular place, it was determined, that where there was a lease for one year from the 25th of March, the lessee might (after the expiration of the term on the succeeding 25th of March) enter, at the October harvest, upon the arable lands, and remove the crop, notwithstanding the positive limitation of his contract. Doug. 361. A warrant of attorney to confess a judgment is, by the course of the court (which is the law of the court), made irrevocable; and yet it is the nature of all letters of attorney to be revocable. Forrest. 95. In Pennsylvania, likewise, several striking precedents have been established upon this point. On proof that it was a usage among tanners to work in and out, for three vatches, it was lately decided in this court, that for that purpose, the lessee of a tan-yard was entitled to hold over the possession, although his agreement was for a fixed and determinate time. So, in the case of a *feme covert*, who could not, at common law, convey her maiden lands, but by *fine*, yet, as it had been the constant usage of the province to make such conveyances *by deeds of bargain and sale, the usage was recognised by the court, and the deeds adjudged to be obligatory. *Lloyd's Lessee* v. *Taylor*, *ante*, 17. In the case at bar, it is proved to have been the general usage, not to value the party- [*343

wall, until the second house is built; and even then, it is frequently delayed for several years; so that it must necessarily be inferred, that the usage extends to make the purchaser of the second house, as liable as the person who built it, for the moiety of the partition; of which, indeed, all the positive evidence has been given, that the nature of the case affords.

For the *defendant*, two points were made: 1st. That the action could not be maintained at common law: And 2d. That it was not authorised by the act of assembly.

1. On the first point, it was observed, that *bonâ fide* purchasers for a valuable consideration are highly favored in law (2 Black. Com. 247); and of these, purchasers under an execution are the most esteemed; insomuch that if the execution is afterwards set aside for irregularity, they shall nevertheless hold the lands. 2 Bac. Abr. 370. (1 Sm. L. 61.) Pursuing this regard for honest purchasers, if a trustee sells trusts lands for a valuable consideration, without giving notice of the trust, the law declares that the buyer shall hold the lands discharged (Cas. Temp. Talb. 260); and even if a man purchases for a valuable consideration, with notice of a settlement, from one who bought without notice, he shall shelter himself under the first purchaser. 1 Atk. 571. The defendant is a *bonâ fide* purchaser under an execution, for a valuable consideration, without notice of the plaintiff's demand: he is, therefore, in all respects, within the benefit of these authorities, and ought not to be made responsible for the negligence of the plaintiff, who had it in his power to recover from the original owner of the house, who knew of the sales, who never gave notice of his claim, at the times of sale, and who has suffered so long a period to elapse, before he made a demand, as to justify a presumption, that, whatever was due, has been paid. Cowp. 109. If, indeed, a man will stand by, at the time of sale, and not disclose his lien, the law deems him guilty of a fraud, and postpones his right to that of the purchaser. 2 Atk. 83; Gilb. Eq. Rep. 85; 1 Ves. 94. In the present case, particularly, it would be highly dangerous, if the rule were otherwise; for there is no record, as in the cases of mortgages and judgments, to which a man can refer in order to ascertain the incumbrances that will thus affect his purchase; nor is there any means by which a remote purchaser can show that the lien has been discharged by his predecessors.

It is evident, then, that a lien of this kind can only be created by the operation of law, or the act of the parties. It is not pretended, that the defendant is liable from his own act; for he neither built the house, nor assumed to pay the money; and when the plaintiff would avail himself of a usage, it is incumbent upon him to make strict proof of its existence; which
*344] he has failed in doing upon this *occasion—whatever might be the effect of the testimony, as between Ingles and Waters, the original builders of the houses, to whom alone it has any relation.

2. Nor, on the second point, is the action authorised by the act of assembly. The words relating to this controversy are, that "the first builder shall be reimbursed one moiety of the charge of the party-wall, or for so much as the next builder shall have occasion to make use of, before he shall in any wise use or break into the said wall, &c." Here, then, is the remedy which, by operation of law, is given to the first builder: and when a statute gives a new remedy, the party must take it on the terms of the act. 2 Burr.

Fitzg. 47 ; 3 Lev. 48 ; Fitz. 85 ; 1 Vent. 104. Str. The plaintiff was empowered to compel a reimbursement of the moiety of his expenses, before Waters could use the wall ; and if he has neglected to do so, although it would perhaps be unjust in Waters himself to refuse the payment, yet there is no legal or moral obligation that can bind a subsequent purchaser ; for, on the spirit and words of the act, he had a right to presume that the claim was already satisfied ; or, if he had known that it was not, he might have insisted on some abatement in the price. The first builder, indeed, could have no greater lien than the carpenter or mason who built the house. In England, where real estate is not liable for the payment of simple-contract debts, if a house descends to the heir, he is not bound to pay the carpenter that repaired it, who can only resort to the personal estate for satisfaction 1 Ves. 155. So, here, as the plaintiff allowed the second builder to use the party-wall, before he exacted the contribution which the law allows, it became a matter of mere personal confidence ; and, however the person of Waters might be liable, his house and lot were effectually discharged.

For the *plaintiff*, in reply.—As the defendant has not relied on the statute of limitations in his plea, no argument from the lapse of time can apply. Nor is it any reason that the plaintiff should lose his claim, because the sheriff omitted or neglected to make it known at the time of sale ; and there is no ground to presume (nor ought fraud ever to be presumed, 2 Atk. 83), that the plaintiff knew when the sale was. Incumbrances in law or equity are not altered or affected by a sheriff's sale. The sheriff has no authority to bind a stranger to the process under which he sells : and this distinguishes the case from that of the trustee, whose acts are binding upon the *cestui que trust*. It is clear, that a mortgage shall divest the title of a purchaser, though the mortgage was not mentioned at the sale ; for the sheriff only sells the right which the defendant had in the premises. The defendant ought to have inquired whether the plaintiff's claim was satisfied; and the law does not help those who sleep, but only those who are active and vigilant.

The right given by the act of assembly, to be paid before, is a new and extraordinary one ; for the common law admits of no compensation until value received. There is not any remedy, however, pointed out for the recovery of this new right ; and it will *hardly be pretended, that an [*345 action would lie before the second house was begun ; until which time, it is impossible to say how much of the wall is wanted, nor, consequently, how much contribution is due. But the plaintiff does not insist on this new right ; he does not ask for payment before, but long after his wall has been used ; and surely, the legislature that gave a right in the former case, must have admitted a much stronger right to recover in the latter ; for he who uses another's property is liable, at all times, to pay for it. This, indeed, is a principle of natural justice, paramount to all acts of assembly ; and as every continuance of a nuisance is as culpable as the original offence, the defendant's continuing to occupy and use the plaintiff's wall, is, in itself, sufficient to make him liable to the present demand.

Shippen, President.--The principal point in this case is, whether, under our act of assembly, the moiety of the cost of a party-wall is a personal charge against the builder of the second house, or such a lien upon the house

itself, as shall render it liable to the reimbursement of the first builder, into whose hands soever it may come?

Lien is a technical term, that means a charge upon lands, running with them, and incumbering them in every change of ownership; as mortgages, judgments, ground-rents, &c. There are some liens, also, created by statute; as, in the very act in question, where a perpetual lien is clearly given to the first builder of a party-wall, for so much of his neighbor's land, as one-half of the breadth of the wall shall cover. It is enacted, at the same time, that the second builder, having the use of one-half of the wall, shall reimburse one-half of the expense of building it; which is a reasonable and useful regulation, calculated to prevent animosities and disputes.

Whether, however, a purchaser of the second house, after it is built, shall be liable to the claim of the first builder, who has neglected or declined to assist upon the payment, before his wall was broken into, has been made a question, but, I think, it is easily resolved by attending to the expression and manifest intent of the law.

The act of assembly declares, that the first builder shall be reimbursed; but it also prescribes the time of reimbursement to be, before the second builder shall in any wise use, or break into the wall. This, it has been observed, is an indefinite right of payment; for, until the second house is begun, it cannot always be ascertained how much of the wall will be wanted, nor, until then, is there any form of action in which a recovery can be had. But this argument may, at once, be obviated, by considering, that if a man makes a breach in my wall, he is a trespasser, and, generally speaking, I have a competent remedy for the injury which he has done. The act of assembly, however, provides, that any person whose lot joins upon my house,

*346] may lawfully use and break into *the wall, if he has first paid me a moiety of the cost of building it. Now, although no action will lie to recover this moiety, until the second house is actually begun, yet, if it is begun, and a breach made in the wall, before the payment, the builder is considered as a trespasser, notwithstanding half of the wall is raised upon his ground; and in an action of trespass against him, he could not justify under this act. Or, perhaps, the plaintiff might waive the trespass and bring an action on the implied assumption, for money paid for the defendant's use.

The difficulty, indeed, of ascertaining how much the first builder is entitled to receive, until the second house is erected, has given rise to the usage that has been proved; but this extends no further than to show, that the valuation of the party-wall is never made before the second house is built, and often, not until several years afterwards. The usage, to this effect, may have a reasonable foundation; but to reach the present case, the evidence of a usage, if at all admissible, ought to have shown, that, for a long series of years, the owner of the second house, however remote from the builder, was held liable to pay the moiety of the charge of the party-wall. This has not, I think, been satisfactorily done.

The plaintiff then contends for his claim, upon another principle, that, as the defendant has the use and occupation of the wall, he ought to be proportionally liable for the cost of building it; and this would certainly be a strong argument, if a lien actually existed. But if the moiety of a party-wall is only a personal charge against the second builder, there is no more

reason that a subsequent purchaser should be responsible for that, than for the payment of a brickmaker or mason. Considering it, therefore, as a lien, it will bind the estate like a mortgage or judgment; but, considering it as a personal charge, the plaintiff, upon an implied contract (as well as the tradesmen who were employed, upon an express one) must resort to Waters for payment and satisfaction of his demand.

This, therefore, brings it to the original question, whether, in this case, a lien exists or not? And the Court are clearly of opinion, that it does not. Why, indeed, should the legislature have directed the payment to be made *before* the breach, if they meant that the second house should be for ever charged with the cost of the party-wall, whoever might be the owner? In almost every instance of a lien, there is some record by which it is announced to the public, and to which every man may have access. But here, it is a dormant transaction; the claim is not known, when the sale takes place, so that the purchaser loses the opportunity of indemnifying himself; and even if it had been satisfied by the first builder, or the intermediate purchaser, that is a fact which it cannot be in the defendant's power at this time to establish.

Verdict for the defendant.(*a*)

---

*McKegg *v.* Crawford. [*347

Practice.—Non-pros.

In this cause, there was a rule to try next term, or *non-pros.*; the term being elapsed, *Levy*, at the settlement of the docket, signed the *non-pros.* in the *prothonotary's* office; and now, *Armstrong* moved to set it aside.

Shippen, President.—This is not like a rule to plead or declare; for a trial is a thing that must be in the face of the country. A *non-pros.* of this kind ought, therefore, to be moved for in court, when the plaintiff may assign reasons for the delay of trial.

The Court seemed satisfied that the *non-pros.* ought to be set aside, but at the request of *Levy*, who thought he could produce some authorities on the subject, they only granted a rule to show cause, &c. The rule, however, was afterwards made absolute.

(*a*) s. p. Hart *v.* Kucher, 5 S. & R. 1; where it was held, that if the value of the moiety of the party-wall be paid to the first builder, by the owner of the adjoining lot, the claim of the former is determined, and a purchaser from him, cannot afterwards recover the amount, when a second building is erected; although he has had no notice of such payment.[1]

[1] And see Davids *v.* Harris, 9 Penn. St. 501; Todd *v.* Stokes, 10 Id. 155; Dannaker *v.* Riley, 14 Id. 435; White *v.* Snyder, 2 Miles 395. The law on this point has been altered by the act 10th April 1849 (P. L. 600); but that act has no retrospective operation. Dannaker *v.* Riley, *ut supra;* Bell *v.* Bronson, 17 Penn. St. 363. See Knight *v.* Beenken, 30 Id. 372, as to the effect of this statute.

GEYER *v.* SMITH.

Practice.

The court will not give referees instructions on a point of law.

THE referees appointed in this cause, applied to the court for instructions on a point of law, in order to guide them in making their report. But—

BY THE COURT.—The referees must first exercise their judgment, upon the lights they have received; and the question, being afterwards brought regularly before us, we will determine, whether they have acted right or not. It would not only be an inconvenient practice, but, in a great degree, destructive of the principle and uses of a reference, if such applications were to be complied with; and therefore, we think it is proper to avoid establishing a precedent.(*a*)

---

*PENMAN *et al. v.* WAYNE.

Foreign attachment.

Under what circumstances, a person may be considered a *resident* in the state.

THIS cause came again before the court, in consequence of the former decision, that, on the rule to show cause why the writ should not be quashed, "the defendant may controvert the fact of his not being *resident* in the state for two years next before the writ issued," which was stated in the deposition filed on the part of the plaintiff, in order to ground a *capias* against him, notwithstanding his being a freeholder. See *ante*, p. 241.

Sergeant, now produced an additional affidavit, setting forth, that the defendant had left this state, and resided in Georgia (where he had considerable property), for upwards of fifteen months, next before the writ issued.

In opposition to which, *Lewis* examined a witness, who proved that the defendant had a real estate in Chester county, whereon his wife and several children constantly resided; that he had expressed an intention of

---

(*a*) Afterwards, in June term 1789, the point of law was argued on the report of the referees. The action was brought against the defendant, as administrator of Robert Smith, on a bond taken by Geyer from the administrator, for the intestate's debt, naming himself administrator. The question was, whether the plaintiff, on the judgment against the administrator on this bond, could take the estate of the intestate in execution?

It was argued by *Sergeant*, *Fisher* and *Wilson*, that he could not; it being the proper debt of the defendant himself, and they cited several authorities.

Ingersoll, on the part of the plaintiff, said, that on considering the law, he had no encouragement to argue it.

SHIPPEN, President.—The case having been broke at the last court, I have looked into the point, and find other cases than those cited at the bar, which show, that a creditor taking a bond from the executor or administrator, discharges the old debt; that the calling himself executor or administrator, in the bond, is surplusage, and that he is chargeable only in his own right. 1 Mod. 225; 10 Id. 254; Cro. Eliz. 406; 9 Co. 98; Vin., Ex., 304.[1]

[1] See Grier *v.* Huston, 8 S. & R. 405; Commonwealth *v.* Shryock, 15 Id. 69; Durling *v.* Neigh, Id. 114; Shields *v.* Owen, 1 Rawle 72.

selling his property in Georgia; that he never meant permanently to reside there, but went thither upon particular business; and that as soon as that was transacted, he designed to return to his estate and family in Pennsylvania.

THE COURT were unanimously and clearly of opinion, that, upon these circumstances, the defendant ought to be considered as a resident of the state of Pennsylvania, and was entitled to his privilege as a freeholder.

Whereupon, the rule to show cause why the writ should not be quashed, was made absolute.(*a*)

BARNARD *v.* FIELD.

Privilege of freeholders.

A *capias* cannot issue against a freeholder, even though the plaintiff directs the sheriff to accept his appearance.

RULE to show cause why the *capias* issued in this case should not be quashed, the defendant being a freeholder. As the plaintiff had delayed issuing process, until within three or four days of the term, he could not issue a summons (which must be, at least, ten days before the return), but he had directed the sheriff to accept the defendant's appearance, by an indorsement on the *capias*.

Heatly, in showing cause against the rule, observed, that the words of the act were, that a freeholder should not be arrested or detained; that in the mode here adopted, there had been no detention; and that it was sanctioned by an uniform practice in similar cases.

Tod insisted, for the defendant, that in no case, upon no terms, shall a *capias* issue against a freeholder, unless he is brought within the exceptions of the act.

*SHIPPEN, President.—The act of assembly expressly directs that the process to be issued against a freeholder, shall be a *summons*. Upon the writ which has issued in this case, the defendant must be arrested, before his appearance can be accepted; and it might hereafter be doubted, under our act of assembly, whether in submitting, even upon those terms, to the *capias*, he has not forfeited his privilege to be sued by a *summons*. [*349

The rule made absolute.(*b*)

(*a*) See Lazarus Barnet's case, and Taylor *v.* Knox, *ante*, p. 152 and 158, and the cases cited in the notes, as to the circumstances which render a person an *inhabitant* under the attachment laws.

(*b*) Notwithstanding the decision in this case, writs of *capias* are frequently issued against freeholders, with directions to the sheriff to accept the defendant's appearance; and the practice seems to be in some measure countenanced by the rules of the supreme court, and of the district court, which direct the mode of proceeding, when the writ is indorsed "no bail required."

Abbot *v.* Pinchin.

Practice.—Rule of reference.

There was a rule of reference in this cause, the report to be made to *next term.* After the next term, however, the referees, who had never met on the business, were changed by consent, and the report made returnable *into office:* Whereupon, it was said by Shippen, President, that the rule for reporting to the next term, was expired by its own limitation, and the case, in that respect, open to any new agreement of the parties.(*a*)

Rapelje *et al.* *v.* Emory.

Interest.

On the trial of this cause, it was ruled by Shippen, President, that where one man has received money belonging to another, and has retained it, without the consent of the owner, it is to be considered in the same light as money lent, and ought to carry interest. He said, that this case was clearly distinguishable from that of goods sold and delivered, where no money actually passes between the parties, and interest is not due of course.(*b*)

Oxley *v.* Cowperthwaite, Sheriff.

Replevin-bond.

The sheriff is responsible that the sureties in a replevin-bond, shall prove sufficient on the termination of the trial.

This was an action against the sheriff for taking insufficient sureties on a replevin-bond; and the question materially discussed on the trial, was, whether a sheriff is responsible that the sureties shall prove sufficient on the event of the replevin; or only that they were of good credit at the time of their entering into the bond?

*350] *Sergeant*, for the plaintiff, observed, that the defendant in replevin could not control the sheriff in accepting or rejecting the sureties, and therefore, he ought not, in justice, to be affected by their eventual insolvency; and he insisted, that, in law, the sheriff takes them at his peril, and is answerable for their proving sufficient. Gilb. on Dist. 67, 176; 1 Bac. Abr. 207.

Levy, for the defendant, stated the history, nature and duties of the sheriff's office from Robertson's Charles the Fifth, 1 Vol. p. 213, and contended, that if a sheriff discharged his duty *bonâ fide*, and with reasonable

---

(*a*) In Shaw *v.* Pearce, 4 Binn. 485, the rule directed the report to be made "to the *next* court," and it was held, that a report might be made to any succeeding term, and to an adjourned court, as part of the term.

(*b*) See the note to Henry *v.* Risk, *ante*, 265. And see Brown *v.* Campbell, 1 S. & R. 176; King *v.* Diehl, 9 Id. 409; Jacobs *v.* Adams, *ante*, 52.

diligence, he was not responsible for consequences which no human foresight could penetrate or prevent.

SHIPPEN, President.—The only point for decision is, whether the sheriff is responsible for the sufficiency of the sureties at the time of taking the bond; or at the end of the suit, when the landlord has established his right to the rent for which the goods were distrained?

The case of a bail-bond differs, I think, in one respect, at least, from a replevin-bond; for the sufficiency of the former may speedily be inquired into, but the latter must wait the event of the replevin, which may be suspended for several years, until, perhaps, by the vicissitudes of trade and fortune, the sureties have become insolvent. This, therefore, is certainly a hard part of the sheriff's duty. But there is likewise a hardship in the case of the landlord; for, by the replevin, he is divested of the immediate security of his tenant's goods, and yet has no right to interfere in the choice of the sureties that undertake to see them returned when he has established his demand.

From this view, then, it certainly seems reasonable, that he, who is exclusively authorised to take and judge of the security, should rather be affected by its eventual insufficiency, than he who has no right to question its validity. The authorities, indeed, are positive, that, if the sureties do not prove sufficient, the sheriff is liable; and, although the case must frequently have happened, no contrary decisions can be produced; for in *Murdoch* v. *Will* (*ante*, p. 341) and *Welch* v. *Proctor*, both lately tried here, the counsel put the cases upon the point of insufficiency of the sureties at the time of taking them; so that the present point never came in question.

That the policy of the law in this respect bears hard upon the sheriff, may be a reason with the legislature to make some new provision for an inquiry into the sufficiency of the bail, in an earlier stage of the cause;[1] but cannot be a justification for our deciding, at this time, contrary to an established principle.

The Court are, therefore, clearly of opinion, that the verdict, on the question of law, ought to be in favor of the plaintiff.

And, accordingly, the jury gave the plaintiff damages to the value of the goods at the time they were distrained.(*a*)

(*a*) The same point was decided by the supreme court, in Pearce *v.* Humphreys, 14 S. & R. 23. Judge DUNCAN, who delivered the opinion of the court, alluding to the alleged hardship of the rule towards the sheriff, said, "with all this impression of the hardship of the case, the court, thirty-eight years ago adhered to the ancient law, which no supposed hardship would justify a departure from: the decision of Oxley *v.* Cowperthwaite has ever since been received as the law of the land."

[1] The acts of 10th April 1873 (P. L. 776), and 19th May 1871 (P. L. 986), make such provision for Philadelphia and Allegheny counties.

SUPREME COURT OF PENNSYLVANIA.

SEPTEMBER TERM, 1788.

WALTON *v.* WILLIS.

Partition in the Orphans' Court.

Under the act of 1764, the eldest son of the eldest son of an intestate was held to be entitled to an estate which could not be divided, at the valuation, in the same manner as his father.

A decree of the orphans' court, on a partition of an intestate's estate, was set aside, because there was no provision made for a tenant by the curtesy.

The fee of an estate, adjudged to the heir-at-law, does not vest in him, until he has paid or secured the shares of the valuation money, to those entitled to it.

THIS was an appeal from the Orphans' Court of the county of Philadelphia. It was argued in January term, by *Levy* and *Tilghman*, for the appellant; and *Sergeant* and *Ingersoll*, for the appellee. And now, the Chief Justice stated the case, and delivered the opinion of the court, in the following manner.

McKEAN, Chief Justice.—Elizabeth Willis being seised of a messuage and lot of land in the city of Philadelphia, with the appurtenances, died intestate, leaving issue, a daughter named Elizabeth, who had intermarried with Samuel Walton, the appellant, and by him had issue, two sons, Joseph and Boaz; and four grandchildren, to wit, Thomas, the respondent, Solomon, Musgrove and Rebecca, being the children of her son Solomon Willis, deceased, who had died before her, intestate. The daughter, Elizabeth Walton, died after her mother, and her husband, the appellant, and their two children, before named, survived her. Thomas Willis, the respondent, applied by petition to the Orphans' Court of the county of Philadelphia, held on the 1st of April 1782, for a partition of the premises; or, if they could not be divided, without prejudice to, or spoiling the whole estate, that a valuation thereof might be made, agreeable to the directions of the acts of assembly in such case made and provided. An inquest was accordingly had, and a return made, that the premises could not be divided, without prejudice to, or spoiling the whole, and valuing the same at 358*l*. This return was confirmed by the court, on the 10th of June 1782, and the premises were adjudged to, and accepted by Thomas Willis, the respondent, at the above valuation; and for securing the payment of that sum, in due proportions, to the other grandchildren, he offered to the court two sureties, who were approved of, and directed to *give bonds in the office of the clerk

*352]

of the court, unto the other grandchildren, for their respective shares; but no such bonds or security have yet been given.

On these proceedings, an appeal is brought before this court; and, upon the argument, the counsel have done great justice to their respective clients. It was our wish, however, that the opinions and practice of the several orphans' courts of Pennsylvania had been ascertained, in cases of this description; and that we might be informed, whether any case, upon similar principles, had been ever determined in the supreme court; for we should be exceedingly cautious in pronouncing a judgment that might shake estates held in this way. As we have not yet obtained full satisfaction on this head, we would still wish to defer giving our opinion; but that we think it proper, from the length of time the cause has been under advisement, to proceed upon the lights we have received.

On the part of the appellant, six exceptions have been taken to the proceedings in the orphans' court.

1. That it is nowhere mentioned, who are the representatives of Elizabeth Willis, the intestate; nor into how many parts the estate should be divided; but the whole is left to the sheriff.

2. That the court have adjudged the estate to a grandson; whereas, they had no authority to go beyond the first degree in the descending line.

3. That even if the acts of assembly did empower the court to go farther, to wit, to the grandchildren, yet that the adjudication ought to have been to all the children of the eldest son, and not to his eldest son exclusively.

4. That no provision is made for the appellant, Samuel Walton, who is tenant by the curtesy of his wife's share, to wit, of a third part, in three parts to be divided.

5. That the judgment is uncertain with respect to the valuation money; inasmuch as the amount of each share is not particularized, nor the time of payment limited.

6. That the partition ought to have been made by one inquest, if practicable; but, if not practicable, and so returned, the valuation ought to have been made by another inquest; and that, on the whole, no estate can be vested in Thomas Willis, by his acceptance at the valuation, as no security has yet been given for the money.

The weight of these exceptions depends upon the due construction of the act of assembly, entitled, "An act for the better settling of intestates' estates," the supplement to that act, and the practice under both of them.

1. With respect, to the first exception; we think, it will be well for the party praying for a partition of an intestate's real estate, to be particular in the names of the persons entitled to shares, and of the property of each: and in this respect to pursue the form of a declaration in partition, and of the return of a writ *de partitione facienda*. But to reverse an inquest for this omission, would certainly affect *many estates, as these proceedings in the orphans' courts are frequently drawn by persons not much skilled in strict forms; and in the present case, as the return of the sheriff has been, that the estate could not be divided, without prejudice to or spoiling the whole, no wrong or damage seems to have been done to any one. For these reasons, we must overrule this objection. [*353

2. The second exception introduces a question, whether a grandson, that is, the eldest son of the eldest son of an intestate, is entitled to an estate, which cannot be divided, at the valuation, in the same manner as his father? and this must be decided by the words, purview and the intent of the legislature, in the two acts of assembly which have been already cited. The main intent of these acts appears to have been, that real estates should be divided among the children, or representatives in the descending line of an intestate; and not descend to the heir at the common law. But a secondary, and the next intent, seems to have been, to prevent estates from being split and frittered into many parts, to their manifest prejudice; and, accordingly, it is provided, that where that would happen, the eldest son or heir-at-law, should have his election of taking the land at a valuation, to be made in the manner prescribed in the acts.

The reason of a law will have great influence in determining its extent; and on the present occasion, the reason alluded to, is much stronger in the case of grandson, than of a son; for, in this case, the distributive shares will probably be most numerous, and, consequently, most injurious to the land by a division or partition. The words "heir-at-law," in both acts, are in strict grammatical construction, an expression or substitute for eldest son; but the reason of the law, and the usage ever since the passing those acts of assembly (as we have been informed) will warrant a more extensive and beneficial interpretation of them. We think, therefore, that this objection likewise fails,(*a*) as well as—

3. The third objection, which we overrule—Thomas being alone the heir at common law.

4. But the fourth exception appears to the court to be fatal. There ought to have been a provision made for Samuel Walton, who had an estate for life by the curtesy, and yet he is not even named in the sentence or decree of the court below. When a writ *de partitione faciendâ* is issued, the sheriff is obliged to summon all the parties to attend; and if they do attend, he must make the partition in their presence. The same thing is not, indeed, expressly required in the partition, or valuation, to be made under the acts of assembly; yet natural justice, and the constant rules of all courts require, that every person, who is interested in the proceedings, should be summoned and heard. 3 Mod. 378. It may not, perhaps, be the practice, nor is it necessary in this case, that it should be set out in the return, by the inquest, though we would wish that to be done; but it is essential to justice, that all parties should, in fact, have notice. On the proceedings before the orphans' court, the appellant has not been made even a party in the de-
*354] cree; and the presumption, of course, is, that he was neither *summoned nor present. If he had been present, he might possibly have urged such arguments, as would have induced the inquest to have put a higher estimate or value upon the premises, and an opportunity ought to have been given to him for that purpose.

(*a*) Under the act of 1794, it has been held, that the children of the eldest son of an intestate, who died in the lifetime of the intestate, succeed as well to the priority of choice, which their father would have had, if he had survived the intestate, as to his share of the estate. Hersha *v.* Brenneman, 6 S. & R. 2. And see Kline *v.* Grayson, 4 Binn. 225.

5. As to the fifth exception; there does not appear to be sufficient certainty in the sentence of the court; inasmuch as the purparts of the valuation money are not specified, nor the time of payment fixed. But this court might reduce both these points to certainty, were there no other exceptions; and in that case, the whole costs of the appeal would fall upon the respondent.

6. On the sixth exception, we must observe, that the practice in the orphans' courts has been to direct the same inquest, which is appointed to make a partition of real estate, if that cannot be done without prejudicing the whole, then to make the valuation. This court, therefore, will not now undertake to alter this long-established practice, though it is liable to some exceptions. But we are of opinion, that the fee in the premises cannot yet be vested in Thomas Willis, as he neither paid, nor secured the payment of the valuation money to those who are entitled to receive it.(*a*)

Upon the whole, let the sentence and decree of the Orphans' Court be reversed.

Respublica *v.* Campbell.

Forcible entry.

This was an inquisition of forcible entry, &c., taken before two justices of Lancaster county. The proceedings being removed by *certiorari* into this court, *Bradford* now moved that they might be quashed; and showed for cause, that the defendant is stated in the inquest to have been possessed, but no estate or term is laid; which, he said, was adjudged to be insufficient in a case of *Respublica* v. *Scott;* the court there observing that Hawkins was express, that an inquisition of forcible entry, &c., will not lie in the case of a tenant at will.

By the Court.—Let the proceedings be quashed.(*b*)

Ross *v.* Clarke.

Foreign attachment.

Money paid into the hands of the prothonotary, in satisfaction of a judgment, is not the subject of a foreign attachment, at the suit of the former defendant.

Foreign Attachment. Clarke, the defendant in this case, had obtained judgment upon a *scire facias* against Ross, the plaintiff, as special bail of one Munro; and a stay of proceedings was entered, until the ensuing term, when Ross was to pay the money recovered into court, if, before that time, the original debtor had not satisfied the debt. The stay being elapsed, Ross paid the money, but upon an apprehension that payment might have been made by Munro, though no accounts were received of it, he immediately issued this foreign attachment against Clarke, and laid it in the hands of the prothonotary.

(*a*) Smith *v.* Scudder, 11 S. & R. 325.

(*b*) See Respublica *v.* Shryber, *ante*, p. 68, and the cases cited there.

Hart v. James.

*On a rule to show cause why the writ should not be quashed, Moylan contended, that foreign attachments might be laid in any hands whatsoever; that, in England, they issued out of an inferior court, and, therefore, could not call money from a superior jurisdiction; but that this reason, which governed all the adverse cases determined there, did not apply under the law or practice of Pennsylvania.

Cox, in support of the rule, observed, that there are many instances where attachments would not lie, besides the one mentioned by his opponent. A debt due by recovery on record, cannot be attached; nor goods levied in execution by *fieri facias* (Com. Dig. 424); nor property of a sovereign state (*Nathan* v. *Virginia*, *ante*, p. 77, in note). But he contended, that the mischief would be intolerable, if the effects of one suit could be thus drawn into perpetual litigation by another.

By the Court.—The money is to be considered in the same state, as if it had been paid into the hands of the sheriff. If a proceeding of this kind were allowed, there could be no end to suits. We are unanimously of opinion, that the foreign attachment has issued irregularly, and ought to be quashed.

The rule made absolute.(*a*)

Hart *et al.* v. James. Two Actions.

Reference.

Referees have no power to consolidate.

Where referees had made *one* report, in two several actions referred to them, on promissory notes, and afterwards filed a supplementary report, distinguishing the sums found in each action, the court set aside both reports.

Where referees were to report to the *next* term, it was held, that the agreement did not authorise the issuing an execution, upon a report into office, during vacation; although a term had intervened between the entering the rule, and the appointment of referees.

These actions were brought upon three promissory notes, two of which (included in one declaration) had been indorsed to the bank; and the third was in the possession of Messrs. Hartshorne & Large, as a collateral security from the plaintiffs, for the payment of a debt amounting to nearly the sum mentioned in the note. In both actions, judgment had been entered, generally, on the 28th day of April 1788, with an agreement in each, that the *quantum* should be ascertained by a reference, and a report made to next term. The referees, however, were not appointed until the 8th of July 1788, six days after the commencement of the term, and they made no report until the 5th of August following; when one report was made in favor of the plaintiffs, for one sum, including what was due in both actions. On

---

(*a*) In McCarty v. Emlen, 2 Yeates 190, s. c. Dall. 277, it was held, that a debt *in suit* might be attached in the hands of the defendant in the suit. C. J. McKean, however, in the course of his opinion, recognised the case in the text, as one in which an attachment would not lie.[1]

[1] So, the proceeds of an execution, in the hands of the sheriff, cannot be attached. Fritz v. Heller, 2 W. & S. 397; Taylor v. Hume, 4 Id. 407; Bentley v. Clegg, 1 Clark 411; s. n. Crossen v. McAllister, Id. 257.

Starret's Case.

the 8th of August, the plaintiffs applied for writs of execution; but, upon the prothonotary's expressing a doubt as to the manner of issuing them, on account of this consolidation of the sums in the report, the plaintiffs prevailed on the referees, separately, and without the consent or knowledge of the defendant, to sign the following explanatory certificate: "For the better explanation of our report in the actions of John Hart and Chamloss Hart against Benjamin James, we find due to the plaintiffs in the first action the sum of 325*l.* 19*s.* 5*d.*, and, in the second, the sum of 668*l.* 2*s.* 9*d.*" This certificate was filed on the 15th of August, when writs of *fieri facias* were taken out, without giving notice of the report to the defendant; who, however, accidentally heard of it, and on the 18th of August, after the executions were issued, he filed the following exceptions.

*1. That one report is made in two actions, severally referred. [*356

2. That the referees filed a supplementary report, without the knowledge of the defendant, at the instance of the plaintiffs.

3. That the first report is on condition, and therefore, the referees have mistaken a plain point of law; the second report being made after their authority had expired.

4. That the promissory notes for which the actions were brought, are not in the plaintiff's hands, but assigned for a valuable consideration, and therefore, there is no legal cause of action.

The exceptions being opposed by *Fisher*, for the plaintiffs, and supported by *Ingersoll* and *Dallas*, for the defendant, the Court seemed clearly of opinion, that the first report could not be maintained;(*a*) that the supplementary report was irregular: and that the rule of reference to report to next term, did not authorise the issuing executions upon the report into office, during the vacation (particularly without notice to the defendant), although a term had intervened between the entering of the rule, and the appointment of the referees.(*b*)

No opinion was given on the other points, but the execution and report were, for the above reasons, set aside, and the actions, by consent, referred *de novo*.

Starret's Case.(*c*)

Privilege.

One attending court, as a suitor, is not privileged from arrest on a *ca. sa.*

Henry Starret, while attending the court as a suitor, was taken by a *ca. sa.*, and *Chambers* moved that he might be discharged from the arrest, citing 4 Bac. 421; 3 Bl. Com. 289; 2 Str. 1094; 1 Barn. 17.

Yeates and *C. Smith* opposed the motion, and contended, that there was a distinction between an arrest on mesne, and on judicial process; for though, in the former case, the court would discharge a suitor, witness, &c.,

---

(*a*) See Brown *v.* Scott, *ante*, p. 145, and the note to that case.

(*b*) See Barre *v.* Affleck, 2 Yeates 274.

(*c*) Determined at Sunbury, N. P., on the 11th of November 1788, before the Chief Justice and Mr. Justice Rush.

from an arrest made during an attendance upon them, yet, in the latter, they would not, because the party would afterwards be remediless. Wood's Inst. 303, 600; 4 Com. Dig. 475; 11 Mod. 234, 252. There is, likewise, another reason: the *capias* on mesne process might be taken out merely on a suggestion; but in judicial process, the debt is certain, and fixed by the judgment of the court.

Chambers and *Hartly*, in reply. The protection of suitors, &c., is established, to promote an equal administration of justice, and to prevent the oppression of a rich and powerful man, over a poor one who is soliciting justice. There is no express authority that extends the doctrine to this case; but in 4 Com. 575, tit. Priv., it is laid down, that an execution shall not be discharged, yet, if the party who procured it, will not consent to a discharge, he shall himself be committed. The books cited in Comyns, Crompton, and Wood's Inst. are of little authority.

*357] *McKean, Chief Justice.—Wood is a writer of great authority, and frequently cited with respect in Westminster Hall. In the case before us, the execution has regularly issued, upon a judgment regularly obtained; and although we should certainly protect suitors, witnesses and jurors, from an arrest on mesne process, during their attendance upon the court, and for a reasonable time in coming and going, yet no case has been shown, which will justify our interference, to discharge a man taken *in* execution, on the ground of such a protection. It is, indeed, the privilege of the court that is infringed; and it is discretionary, to grant it, on some occasions, and to refuse it, upon others.(*a*)

By the Court.—The prisoner must be remanded.

(*a*) The same point was determined in Hannum *v.* Askew, 1 Yeates 25, by Judges Shippen and Yeates, after argument. Judge Yeates said, "I was of counsel in Starret's case, and it was then pressed, that the authorities cited by Wood, did not warrant his doctrine. This gave rise to the Chief Justice's remark respecting the author. Upon my return from the circuit, I examined the point very fully, and found that 2 Trials per Pais, 382; 3 Salk. 46; Crompton's Just. 162, 181, fully established the distinction, which is here contended against." Notwithstanding which, it is said, in a note to 4 Dall. 388, "It was admitted by the counsel, Mr. *Ingersoll* and Mr. *Rawle*, on both sides, that the authority of Starret's case had been often doubted, both on the bench and at the bar, though never expressly overruled." And in Ex parte Hurst, 1 W. C. C. 186, s. c. 4 Dall. 387, the circuit court of the United States expressly decided, that a suitor in that court was privileged from arrest on a *ca. sa.*; and Hurst was discharged from custody, although the writ issued from the supreme court of the state. See the note to Morgan *v.* Eckert, *ante*, p. 295: and see Miles *v.* McCullough, 1 Binn. 77; Blight *v.* Fisher. Peters C. C. 41; Hayes *v.* Shields, 2 Yeates 222; Davis *v.* Cummins, 3 Id. 387; Smythe *v.* Banks, 4 Dall. 329; Commonwealth *v.* Hambright, 4 S. & R. 149.

RESPUBLICA *v.* SPARHAWK.

War powers.

During the war of the revolution congress had a right to direct the removal of any articles that were necessary to the continental army, or useful to the enemy, and in danger of falling into their hands; and one, whose property, so removed, was afterwards captured by the enemy, was held not to be entitled to compensation from the commonwealth.

THIS was an appeal from the comptroller-general's decision, on the trial of which, by consent of the attorney-general, Sparhawk was considered as plaintiff. There was a verdict and judgment *nisi* for the commonwealth, when *Ingersoll* obtained a rule to show cause why a new trial should not be granted.

The case was this: Congress, perceiving that it was the intention of the British army to possess themselves of Philadelphia, and being informed that considerable deposits of provisions, &c., were made in that city, entered into a resolution, on the 11th of April 1777, that "a committee should be appointed to examine into the truth of their information; and, if it was found true, to take effectual measures, in conjunction with the Pennsylvania board of war, to prevent such provisions from falling into the hands of the enemy."

On the 13th of the same month, the Pennsylvania board of war, in aid of this resolution, addressed a circular letter to a number of citizens in each ward of the city, requesting them "to obtain from every family a return of the provisions, &c., then in possession, and the number of persons that composed the families, respectively, in order that proper measures might be pursued for removing any unnecessary quantity of supplies to a place of security." At the same time, it was mentioned, that "this proceeding was not intended to alter or divest the property in the articles removed; but on the contrary, that the same should be, at all times, liable to the order of the respective owners, provided they were not exposed to be taken by the enemy."

That no precaution might be omitted upon this occasion, the Pennsylvania board of war, on the succeeding day, desired General Schuyler to prevent the introduction of further supplies, and to adopt the most effectual means for preventing the departure of the wagons which were then in the city, and for procuring as many more as would *be necessary to transport, not only the public stores, but also such private effects, as it might be thought expedient to remove. [*358

Several intercepted letters having increased the apprehensions of Congress, on the 16th of April 1777, they resolved, "that it be recommended to the President and members of the executive authority of this state, to request the commanding officer of the continental forces in this city, to take the most effectual means, that all provisions, and every other article, which, by falling into the hands of the enemy, may aid them in their operations of war against the United States, or the loss of which might distress the continental army, be immediately removed to such places, as shall be deemed most convenient and secure."

This recommendation was transmitted by the executive council to the Pennsylvania board of war, who, on the 18th of April, passed an order, that "houses, barns, stores, &c., should be hired or seized for the reception of

such articles as should be sent out of the city, by their direction or that of congress ;" and accordingly, a very considerable quantity of property was soon removed to Chestnut-Hill, and placed under the care of Messrs. Loughead & Barnhill ; who gave receipts to the owners, promising "to restore what belonged to them, respectively, or to deliver the same to their respective orders."

The enemy not approaching so rapidly as was expected, a considerable part of this property had, accordingly, been re-delivered to the order of the owners, before the city was entered by the British troops ; when, however, the depot at Chestnut-Hill fell, likewise, into their hands, and with it, 227 barrels of flour, belonging to Sparhawk ; being the remainder of 323 barrels that had been originally removed thither, in consequence of the above-mentioned proceedings.

For the price of these 227 barrels of flour, with interest from the time of their being taken, Sparhawk exhibited an account, amounting to 919*l.* 6*s.* 6*d.*, against the public ; upon which, the comptroller-general reported to the executive council, that "neither the principal, the interest, nor any part of either, could be allowed ;" and against this decision, the present appeal was entered.

The question, therefore, on the motion for a new trial, was, whether this claim, under all the circumstances, ought to be admitted? And it was argued, on the 28th of April, by *Ingersoll*, for the appellant; and the *Attorney-General*, for the commonwealth.

On the part of the *appellant*, it was premised, that, in a season of peace, the law had so great a regard for private property, that it would not authorise the least violation of it; no, not even for the general good of the whole community. 1 Black. Com. 139. And it was contended, that although a state of war entitled one nation to seize and lay waste the property of another, and their respective subjects to molest the persons, and to seize the effects of their opponents, yet, as between a state and its own citizens, the principle, with respect to the rights of property, is immutably the same, in war as well as peace. Sometimes, indeed, the welfare of the public
*359] *may be allowed to interfere with the immediate possessions of an individual ; but these must be cases of absolute necessity, in which every good citizen ought cheerfully to acquiesce. Yet, even then, justice requires, and the law declares, that an adequate compensation should be made for the wrong that is done. For the burden of the war ought to be equally borne by all who are interested in it, and not fall disproportionately heavy upon a few. These general principles are fortified by the explicit language of the Declaration of Rights, § 8, which provides, that "no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives." In the present case, the appellant did not voluntarily surrender his property, nor was it taken from him by any legislative sanction.

That there are, however, some instances where an individual is not entitled to redress for injuries committed on his property in the prosecution of public objects, must be admitted; but these instances are carefully distinguished by the writers on the law of nations (Vatt. lib. 3, § 232); and are in no degree analogous to the foundation of the appellant's claim. If, indeed,

the property in question had remained in Philadelphia, and had there been seized by the enemy, there could have been no reason to claim an indemnification from the public; but when it was taken out of the possession of the owner, by the executive authority of the state, and removed to a distant place, with a promise of restoring it, on demand, the subsequent capture being clearly a consequence of this interference, the government is bound to indemnify the appellant for his loss.

It is unnecessary to travel into an investigation of the various modes, by which an individual may seek for redress and compensation, where his property has been divested for the use of the public. The right is clear, and that every right must have a remedy, is a principle of general law, which the legislature of Pennsylvania has expressly recognised; directing, by an early act of assembly, the settlement of the accounts of the committee and council of safety; and prescribing in what manner the claims of individuals should be settled and discharged. 2 State Laws 144.[1] To these bodies, the Pennsylvania board of war succeeded; the business of the board was transacted in the same way; and there can be no good reason, why the obligations which they incurred, should not be as fairly and fully adjusted and satisfied. The legislature, indeed, must have regarded the matter in the same light; for, finding that the former law was inadequate to its objects, another was enacted to appoint a comptroller-general, and to authorise him "to liquidate and settle, according to law and equity, all claims against the commonwealth, for services performed, moneys advanced, or articles furnished, by order of the legislative or executive powers, for the use of the same, or for any other purpose whatever."

This authority embraced the appellant's claim, and the comptroller-general has erred in deciding against it.

*The *Attorney-General*, for the commonwealth, stated the case to be briefly this: that the Pennsylvania board of war, acting under [*360 the recommendations of congress, removed, among other things, a quantity of flour belonging to the appellant, in order to prevent its falling into the hands of the enemy; declaring, however, that the removal was not intended to divest the property, but that the flour should still be subject to the order of the owner, provided it was not exposed to a capture. The flour being afterwards seized by the British troops, at the place where the Pennsylvania board of war had deposited it, two questions arise: 1st. Whether this court has power to grant relief to the appellant, if any ought to be granted? And 2d. Whether, on principles of law and equity, he is entitled to be relieved?

I. Considering this as a case immediately between Sparhawk and the commonwealth, it is clear, that a sovereign is not amenable in any court, unless by his own consent (1 Black. Com. 242). And therefore, unless the commonwealth has expressly consented, there is nothing in the constitution of this court which can warrant their sustaining the present proceedings. What, then, is the evidence of consent? We are referred to the law appointing the comptroller-general. Let us examine this law; and as the case

[1] This is the volume generally known as McKean's Laws. The act cited is that of the 2d September 1778. P. L. 146.

comes by appeal from the comptroller, if it appears that he had no authority to liquidate and settle Sparhawk's claim, it follows, as a necessary consequence, that this court also has no jurisdiction for that purpose.

By the act of assembly which gives the appeal from the comptroller-general's decision to the supreme court (3 State Laws 444[1]), this is restricted to such accounts as he shall settle *in pursuance* of the preceding act, by which he was appointed (3 State Laws 51[2]), and there, we find the specific object of his authority to be, the liquidation and settlement of all claims against the commonwealth, "for services performed, moneys advanced, or articles furnished, by order of the legislative or executive powers, &c." In order, therefore, to found the jurisdiction of the comptroller, two things must concur: 1st, that the claims be for services performed, moneys advanced, or articles furnished: and 2d, that the debt has been incurred by order of the legislative or executive power.

Now, in the present case, the appellant makes no claim for services performed, or money advanced, and it is impossible for the most ingenious fancy to bring his demand within the description of articles furnished. It is conceded, indeed, that the law does not, in peace, acknowledge any authority to violate the rights of property, or to interfere with the possessions of individuals; but there is in war a transcendent power, which is connected with the fundamental principle of all governments, the preservation of the whole; and the interest of private persons may, certainly, in that season, be sacrificed, *ne quid respublica detrimenti capiat.* The loss, of which the appellant complains was occasioned by the exercise of this power. As a *tort*, it cannot be charged against the commonwealth; for a declaration stating it so, would be cause of demurrer: and, therefore, as it is only
*361] *in cases of contract, either express or implied, that the comptroller-general is authorised to act, there is no jurisdiction which can relieve him, but that of the legislature.

But in the next place, the claim does not originate upon any order of the legislative or executive power, agreeable to the terms of the act. The order for the removal of the provision, &c., to Chesnut-Hill was issued by the Pennsylvania board of war, not in obedience to the executive council, but in pursuance of a recommendation from congress, which the executive council merely transmitted to the board. Even, indeed, if the executive council had undertaken to direct this proceeding, a question would still arise, whether they had a right to do so? for the act of assembly, providing for the settlement of claims against the public, by order of the executive council, though not in express words, yet, by a necessary implication, must intend a legitimate order, founded upon the constitutional powers of that department, or issued under the authority of some law. The executive council cannot otherwise charge the public; without the legislative sanction, they cannot erect magazines, or any other public buildings; nor enter into the most trifling contract; of which, indeed, a recent proof appears, in the refusal of the general assembly to pay for the arms of the state, that had been placed in the supreme court, or to discharge the additional expense of the triumphal

---

[1] Act 18th February 1785, § 2 (P. L. 444), here cited as 3 State Laws.
[2] Act 13th April 1782. P. L. 51.

arch which had been incurred by the direction and upon the faith of the executive council.

II. But it is further to be shown, that, even supposing the comptroller-general, or this court, upon appeal, had the power of granting Sparhawk's claim, yet, that the claim itself is not founded in law or equity, and ought, therefore, to be rejected. If the appellant's claim be just, he ought either to urge it against the immediate agent in the wrong which he has sustained, or travel to the source, and demand reparation from congress. The commonwealth of Pennsylvania cannot be liable; for the persons who took and kept the provisions, &c., at Chesnut-Hill, acted under the authority of the board of war, who, it is true, were appointed by the executive council; but in this instance, proceeded entirely upon the recommendation of congress, which the executive council did not, and could not, legally enjoin or enforce. It is possible, however, that in strict law, Messrs. Loughead & Barnhill would have been liable as trespassers, had not the legislature interfered to protect persons in their situation from vexatious prosecutions (3 State Laws, 178[1]). And this act, although it relates immediately to individuals, shows, generally, that the temporary bodies, by whose orders such individuals were governed, are, likewise, to be exempted from suits, on account of their conduct in the service of their country.

But, on what ground can redress be at all expected on this occasion? The removal of the appellant's property arose from the necessity of the war; it was not done to convert the flour to the public use, nor to deprive the owner of the advantages of it, any farther than the paramount consideration of the public welfare required. *The object was, to secure it from [*362
the depredations of the enemy; and that it, afterwards, fell into their hands, was an event involuntary, and merely accidental, in which case Vattel expressly says, no compensation shall be made. (Vatt. lib. 3, § 232.) If the appellant is entitled to relief, every farmer whose cattle have been driven from his plantation to avoid the enemy; every man whose liquors have been staved, or provisions destroyed, upon the approach of the British troops; all the owners of Tinicum island, which was deluged by a military mandate; and, in short, every one whose interests have been affected by the chance of war, must also, in an equal distribution of justice, be effectually indemnified. What nation could sustain the enormous load of debt which so ruinous a doctrine would create?

Ingersoll, in reply.—With respect to the first point made on the part of the commonwealth, it is not contended, for the appellant, that, generally speaking, citizens may sue the state; but only that every government, which is not absolutely despotic, has provided some means (in England, for instance, by petition in chancery) to obtain a redress of injuries from the sovereign.

As to the second point: The Pennsylvania board of war acted under the authority of the executive council; and the principal is responsible for the agent. When the appellant's property was taken out of his own custody, the government stood in his place, and undertook all the consequent risks. The individuals who were charged with the care of it, are protected by the act of assembly; but the state, upon every principle of justice, is still liable

[1] Act 21st March 1783. P. L. 178.

for the loss; and the authority of the comptroller-general was intended, and has always been understood, to be competent for granting the satisfaction which is now claimed.

The Chief Justice, after stating the case, delivered the opinion of the court as follows:

McKean, Chief Justice.—On the circumstances of this case, two points arise: 1st, Whether the appellant ought to receive any compensation, or not? And 2d, Whether this court can grant the relief which is claimed?

Upon the first point, we are to be governed by reason, by the law of nations, and by precedents analogous to the subject before us. The transaction, it must be remembered, happened *flagrante bello;* and many things are lawful in that season, which would not be permitted in a time of peace. The seizure of the property in question, can, indeed, only be justified under this distinction; for, otherwise, it would clearly have been a trespass; which, from the very nature of the term, *transgressio*, imports to go beyond what is right. 5 Bac. Abr. 150. It is a rule, however, that it is better to suffer a private mischief, than a public inconvenience; and the rights of necessity, form a part of our law.

*363] *Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private inclosure. 2 Black. Com. 36. So, if a man is assaulted, he may fly through another's close. 5 Bac. Abr. 173. In time of war, bulwarks may be built on private ground (Dyer 8; Brook., Trespass, 213; 5 Bac. Abr. 175); and the reason assigned is particularly applicable to the present case, because it is for the public safety (20 Vin. Abr., Trespass, B. a, § 4, fo. 476). Thus, also, every man may, of common right, justify the going of his servants or horses, upon the banks of navigable rivers, for towing barges, &c., to whomsoever the right of the soil belongs. 1 Ld. Raym. 725. The pursuit of foxes through another's ground is allowed, because the destruction of such animals is for the public good. 2 Buls. 62; Cro. Jac. 321. And, as the safety of the people is a law above all others, it is lawful to part affrayers, in the house of another man. Kelyng 46; 5 Bac. Abr. 177; 20 Vin. Abr. fo. 407, § 14. Houses may be razed, to prevent the spreading of fire, because for the public good. Dyer 36; Rud. L. and Eq. 312; See Puff. lib. 2; c. 6, § 8; Hutch. Mor. Philos. lib. 2, c. 16. We find, indeed, a memorable instance of folly recorded in the 3 vol. of Clarendon's History, where it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, nor consent to, the pulling down forty wooden houses, or to the removing the furniture, &c., belonging to the lawyers of the temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct, half that great city was burnt.

We are clearly of opinion, that congress might lawfully direct the removal of any articles that were necessary to the maintenance of the continental army, or useful to the enemy, and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this was a natural and necessary incident: and having done it lawfully, there is nothing in the circumstances of the case, which, we think, entitles the appellant to a compensation for the consequent loss.

With respect to the second point: This court has authority to confirm

or alter any proceedings that come properly before the comptroller-general; but if he had no jurisdiction, we can have none. It appears, then, that his power is expressly limited to claims "for services performed, moneys advanced, or articles furnished," by order of the legislature, or the executive council. And, as he has no right to adjudge a compensation from the state for damages, which individuals may have suffered in the course of our military operations, we are of opinion, that we could grant no relief, even if the appellant was entitled to it.

By the Court.—Let the rule be discharged; and the judgment for the commonwealth be made absolute.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

DECEMBER TERM, 1788.

KUNCKLE *v.* KUNCKLE.

Attachment.

Where a report of referees awarded money to be paid by the defendant, and on the other side, that the plaintiff should make a conveyance of land, and take up a bond and mortgage in the loan-office, it was held, that the plaintiff might be compelled to perform his part of the award, by *attachment*.[1]

EXCEPTIONS were filed to the report of referees in this cause; which were argued, on the 20th of November, by *Wilson* and *Todd*, for the defendant; and *Sergeant*, for the plaintiff.

The President now stated the material circumstances; and delivered the opinion of the court as follows:

SHIPPEN, President.—This is a motion to set aside the report of referees, on two grounds: 1st, For the misbehavior of the two referees, who signed the report, in deciding the dispute, without notice to the third referee, who did not sign it. The evidence by no means supports this objection, as it appears that the two referees had agreed upon the substance of their report, in the presence of the third referee, who declared his disagreement, and said the others could make the report without him.

The second objection is to the report itself, as awarding money to be paid by the defendant on one side, and the making conveyances of land and a lot of ground, and taking up a bond and mortgage in the loan-office, by

is, that the
n may issue
e compelled
are not the

le of court,
d utility, for
in the courts

of law, that the judges have always encouraged and supported it; more especially as, in this mode of trial, the referees are not tied down by the strict rules of law, but may decide as the equity of the case may appear, and in some sort supply our want of a court of chancery. As the referees are judges of the parties' own choosing, we never enter into the merits of the causes they decide, nor, in general, set aside their reports but for misbehavior, or where the objections arise on the face of the proceedings.

Where a report of referees awards money to be paid on one side, and certain other things to be done on the other, if the court cannot enforce both, they will certainly enforce neither. In the present case, the question will be, whether they can oblige the plaintiff to perform his part of the award? They certainly cannot do it by execution; but if they can do it by attachment, the remedies are mutual, though not by the same kind of process. That an attachment will lie for a contempt in not performing an award of referees, appears clearly to have been agreeable to the common law, prior to the statute of 9 & 10 *Wm. III.*, which is declared by the judges, and appears from a perusal of the act itself, to have been made only to put agreements to refer cases, never instituted in court, upon the same footing with causes already in court, and to be declaratory of what the law was before, in the latter cases.

I have inspected the record in the case of *Stuart* v. *Ralston* in the supreme court, and the judgment in that case seems decisive on the present question.(*a*) There, the award was that money should be paid by the defendant to the plaintiff, and that the plaintiff should, at a future time, when certain proceeds of pot-ash should come to his hands, and when a certain debt should be received, pay the amount of one-half of them to the defendant. The objection with regard to the time of the plaintiff's performing his part of the award was much stronger than in the present case; which requires that it shall be done within five days after payment of the money.

In all cases of this kind, the court will exercise its equitable powers, in such a manner, as not to suffer either party to elude the performance of their part of the award. If, for instance, execution should be taken out by the plaintiff, against the defendant, and any well-grounded suspicion should appear, that the plaintiff was contriving, by flight, or otherwise, to avoid complying with his part, the court would order the money levied to be lodged in court, until the plaintiff should comply; or might impose such other terms upon him as should appear necessary to oblige a compliance.

As to the objection that part of the award is impossible to be complied with, the defendant himself having taken up the loan-office security, which was directed by the referees to be done by the plaintiff; it is evident, from the time of its being done, that it was with a view of making the present objection, it being done two days *after the referees had agreed upon their report, though before the actual signing of it. [*366
This, however, is no legal objection, because if any part of an award be impossible to be performed, it appears by a case in Salk. 83 (*Forster* v. *Branetti*),

(*a*) See the note to Buckley *v.* Durant, *ante*, p. 129. And see Williams *v.* Landon, 14 S. & R. 388.

that the court will refuse an attachment for that part. Yet, as the plaintiff in the present case would receive the benefit of what the defendant has done in taking up the security, we should certainly think it equitable, that he should abate so much out of the money to be recovered, and upon application would oblige him to do it; and, in general, see that the report was carried into execution, in all its parts, agreeable to the intent of the referees, and the justice of the case.

We, therefore, confirm the report.(*a*)

GORGERAT *et al. v.* MCCARTY.

Bankruptcy.—Bail.

Where one who had declared himself bankrupt according to the law of France, but had not received a conclusive discharge, was arrested in Pennsylvania, by one of the creditors, who had proved and registered his debt in the French court, it was *held*, that he was not entitled to be discharged on common bail.

ON a rule to show cause why the defendant should not be discharged on common bail, McCarty stated in his deposition, that, being considerably embarrassed, he had, according to the laws of France, declared himself a bankrupt, by filing a statement of his debts and credits, and delivering all his books and papers into the consular court of L'Orient, for the benefit of his creditors; the principal part of whom, in consequence of this surrender, had met together, appointed trustees or syndics, in the usual form, and then granted him a letter of license, for three years, together with a power of attorney, to collect his outstanding debts in America, in order to remit the same for their use; stipulating, however, that he should return to France within one year from the time of his departure. The plaintiff, among others, had proved and registered his debt in the consular court; and it was agreed by the counsel for both parties, that, on a surrender of this description, if three-fourths in value of the creditors had consented to the defendant's discharge, the agreement or composition by them signed, being homologated, that is to say, recorded and confirmed by the court of parliament (which is a matter of course, unless fraud is shown), became, by the *lex loci*, obligatory upon the non-subscribing creditors.

Ingersoll, in support of the rule, contended, that it was settled by the decisions in *Millar* v. *Hall* (*ante*, 229) and *Thompson* v. *Young* (*ante*, 294), that a discharge under the laws of one country, operated as such in every other; and he offered to prove, by the testimony of the defendant himself, that three-fourths in value (the deposition only stating that the principal part) of the creditors had agreed to the composition at L'Orient; observing, that, if this would be sufficient to induce the court to order an *exoneretur*, after judgment, it would also be sufficient to induce them to discharge the defendant, in the present stage of the cause.

Du Ponceau, having read a positive affidavit of a subsisting debt, op-

---

(*a*) See Blackburn *v.* Markle, 6 Binn. 174; s. c. 12 S. & R. 143; Nicholas *v.* Wolfersberger, 5 Id. 167.

posed the admission of the defendant's testimony. He said, *that, even if McCarty's discharge according to the *lex loci* could be actually proved, it would not operate against the plaintiff, on a motion of this kind. The mutual spirit of intercourse among nations has, indeed, introduced a more liberal idea of the *cessio bonorum;* and upon trial of the cause, such proof would probably be fatal to the plaintiff's demand; but whether he is discharged, or not, is a matter of fact, to be decided by the verdict of a jury (Salk. 100); and to deprive the plaintiff of special bail, at this time, would not only be an illegal anticipation of that decision, but, in effect, a denial of justice, as it appears that the defendant is under an obligation to repair shortly to France, and would probably never venture again within the jurisdiction of this court.

He contended, however, that even by his own showing, McCarty had not been discharged in France; and represented, that the proceedings in the consular court amounted to no more than an inchoate bankruptcy; for, the concurrence of three-fourths in value of his creditors to the composition alleged, and the *homologation* or confirmation thereof by the parliament, being an indispensable requisite to his discharge, until that was established, it could not avail the defendant, that he had made a surrender, or that the plaintiff had proved his debt, any more than the surrender of a bankrupt here, or the proof of a debt under the commission, would be sufficient to preclude a creditor from his remedy at law, before a certificate was actually granted.

Nor was the defendant's testimony, he urged, competent to prove the fact, which, by the *lex loci*, operates as a discharge; it is a matter to be shown by an exemplification of the foreign record; when, perhaps, it may be tantamount to a bankrupt's certificate; or, with stricter analogy, it may be compared to the case of a discharge under the composition law of England; and he cited a case, which he said was exactly in point, from Salk. 99, pl. 7, where the court, on a question of bail, would not allow the defendant to show that he had obtained his discharge under the act, and that the plaintiff was bound, though a non-subscriber, to the composition.

Ingersoll, in reply, said, that he did not mean to contend, that the debt was discharged; but only to show, by the testimony of the defendant, a collateral fact, which entitled his person to an exemption from arrest in the present case. He agreed, that the proceedings amounted only to an inchoate bankruptcy, under the insolvent laws of France; but he insisted, that it would be cruel and unjust, to allow the plaintiff all the advantage of his concurrence there, and likewise the benefit of special bail in an action here. Although it may be true, therefore, that the defendant had not yet received what would amount to a certificate, yet, as has surrendered all his effects, muniments and vouchers, to the proper officers, for the benefit, and with the knowledge and approbation of the plaintiff, as well as his other creditors, the court will not suffer the oppression that is now attempted, but rather incline to hear the defendant in favor of the rule; and, if it can be shown that three-fourths in *value of his creditors have agreed to his discharge, the established principles of law will protect him here from the molestation of a refractory individual. [*368

SHIPPEN, President.—There are certain rules adopted for the govern-

ment of the court in respect to bail, which, as they are consonant to law and reason, ought not to be wantonly violated. In cases of necessity, however, these rules admit of some relaxation; as, where it is impracticable to obtain a positive affidavit of the debt, the court, being satisfied of its existence, by collateral proofs, will order special bail to be entered.

But the present question is not of that nature; for the matter alleged in support of the rule, goes immediately to the merits of the cause, and cannot with any propriety, be considered as a fact merely collateral. It is, in effect, saying, that the defendant has paid the plaintiff's debt; which surely cannot be tried, on a motion of this kind; nor can it, at any time, be substantiated by the testimony of the defendant himself.

I think, indeed, that the liberality of our courts has already extended the benefits of a *cessio bonorum* in another country, as far as prudence will justify. In the cases of *Millar* v. *Hall*, and *Thompson* v. *Young*, there had been a general surrender for the benefit of all the creditors; and judgments of discharge from their respective debts, were regularly pronounced and certified in favor of the defendants by the court of a sister state. This distinguishes these cases from the case of *James et al* v. *Allen* (*ante*, 188), where the defendant's person only was discharged, under a law of New Jersey, clearly local in its terms and operation; and in the case of *Le Clerc* v. *Richette*, our opinion, in directing the jury to find for the defendant, was founded upon the evidence that the plaintiff was a party to the proceedings in France, and that an actual discharge had been obtained conformable to the laws of that kingdom.

From these decisions, it may be collected, that the judgment of a foreign court, discharging the debt, would, for that purpose, be recognised here; but it would be contrary to reason, justice and law, to protect a man from arrest, who had made his way to this country, before he obtained his certificate, merely because he had committed an act of bankruptcy, and surrendered to the commissioners in England. The objections are equally strong upon the present occasion; for it is clear, that the proceedings, which have hitherto taken place in the consular court of L'Orient, are inchoate and inconclusive; and, even if the plaintiff had signed the letter of license for three years, that, according to an express authority in Barnes, would not be a sufficient cause for refusing special bail.

Upon the whole, the Court are clearly of opinion, that the defendant is not entitled to be released on common bail; and, therefore, direct—

The rule to be discharged.(*a*)

---

*369] *Waters *v.* Millar.

Promissory note.

The mere sale and delivery of a promissory note, payable *to order*, without any indorsement or assignment, does not entitle the holder to sue in his own name.

On a motion in arrest of judgment, after a verdict for the plaintiff in this cause, it appeared, that the defendant had given his note of hand to one Jesserow, which was expressed in these words: "I promise to pay, or cause

(*a*) See the note to James *v.* Allen, *ante*, p. 188; and see also Harris *v.* Mandeville, 2 Dall. 256, s. c. 2 Yeates 99; Milne *v.* Moreton, 6 Binn. 353.

to be paid, unto George Jesserow, or order, the full sum of 20*l.*, against or before the 27th day of November 1785." This note was afterwards sold and delivered, for a valuable consideration, by Jesserow to the plaintiff, but without any indorsement or written assignment; and the defendant having refused to pay it, this action was instituted, in which the declaration, after stating the note, &c., proceeded as follows:—"And whereas, the said George, afterwards, to wit, on the 4th day of November, in the said year, in the city and county aforesaid, the said 20*l.* being wholly unpaid, for a valuable consideration to him by the said Nicholas (Waters) then and there paid, bargained and sold the said promissory note to the said Nicholas, and possession thereof to him, then and there, delivered; and in consideration whereof, the said Jacob (Millar) afterwards, to wit, the same day and year last aforesaid, at the city and county aforesaid, at the special instance and request of the said Nicholas, assumed upon himself, and then and there promised the said Nicholas, that he would pay him the said 20*l.*, according to the tenor and effect of the said note. Nevertheless, the said Jacob, the said sum of money, according to the tenor and effect of the said note, hath not paid unto the said Nicholas, &c."

The question was, whether the plaintiff could maintain the present suit in his own name, upon the mere sale and delivery of the note, without any indorsement or assignment from Jesserow to him?

Sergeant, for the defendant, having premised, that, if there was a consideration, it was immaterial to lay a promise to pay the note, and on the other hand, that, if there was no consideration, the promise was nugatory and void, contended, that a promissory note, being a chose in action, was not assignable by writing, at common law, much less by delivery alone (Cun. L. B. Ex. 105; 3 Bac. Abr. 605; Salk. 129; Ld. Raym. 757, 774); and that this could not be likened to a note payable to *bearer*, where possession gives the action (Cun. L. B. Ex. 129); but it is the case of a note payable to one, *or his order*, which order must be in writing, to bring it within the statute. As, therefore, no indorsement or assignment is laid, the action cannot be maintained, in its present form. It is true, that the assignee of a bond may sue in the name of the obligee; and the plaintiff might sue in the name of Jesserow; but in that case, the defendant could prove a set-off, and show the balance to be in his favor. Of this advantage, he would now, perhaps, be deprived; nor would this action be final, if a *bona fide* indorsee of Jesserow should hereafter appear.

Rawle, in opposing the motion, observed, that the verdict had cured all exceptions to the expressions of the declaration, and that *the plaintiff [*370
had an equitable right to recover, having bought the note for a valuable consideration; which, of itself, was sufficient to induce the court to consider him as agent, or attorney, to do what Jesserow might have done; and an attorney, &c., who has a naked authority to receive, may sue in his own name, on a promise to pay to him. (Lev. 188; 1 Vent. 318, 332; 2 W. Black. Term Rep.) He then insisted, that the sale and delivery were a good assignment, without writing; which is not necessary to a contract, otherwise than as evidence of it (3 Burr 1670); and he contended, that there was a sufficient consideration for the *assumpsit* laid in the declaration; that being, he

said, the material ground of the action, and not, as the adverse counsel suggested, the mere possession of the note; that the plaintiff's receipt for the money would be a sufficient discharge from any claim on the part of Jesserow; and that, even if the promise were not strictly laid in the declaration, the practice of overlooking similar inaccuracies, in order to promote the justice of the case, would supply that defect. 3 Bl. Com. 394; Salk. 29; 1 Wils. 255; 3 Id. 40; Salk. 364; 1 Sid. 218; 1 Vent. 40. There is, however, at least, so much consideration for the *assumpsit* as the possession of the note; and the question of damnification could not come before the court on the present motion, which is in arrest of judgment, and not for a new trial. See Cro. Eliz. 67; Hob. 4; 1 Sid. 31; Styl. 296; 1 Com. Dig. 138.(*a*)

SHIPPEN, President.—This is a motion in arrest of judgment, on the ground that no consideration is laid in the declaration to found the *assumpsit* upon; and as it tends to destroy the plaintiff's action, after a verdict given in his favor upon the merits, the court would afford every aid in its power, consistently with law, to carry the verdict into effect; but they must not depart from the established principles of law, which are wisely calculated for general cases, although in particular ones they may sometimes appear to be hard.

The declaration states, that "the defendant Jacob Millar gave his promissory note to one George Jesserow for 20*l.*, payable to him or his order; that by virtue of the statute, the said Jacob became thereupon liable to pay to the said George, or his order, the said sum of 20*l.* That the said George, afterwards, for a valuable consideration, bargained and sold the said note to the plaintiff, and delivered him possession of it; and that in consideration thereof, the defendant assumed and promised to pay the 20*l.* to the plaintiff, according to the tenor and effect of the said note."

The question is, whether the sale and delivery of the note to the plaintiff is, of itself, without any indorsement or assignment, a legal ground of the *assumpsit?* for no other consideration is laid.

The note is a negotiable note, payable to Jesserow, or his order; the remedy, therefore, as upon the instrument itself, is confined to Jesserow, or his order; and it would indeed be confined to Jesserow himself, as a chose in action, if the act of parliament, or act of assembly, did not enable an assignee to sue in his own name. *There must then be some collateral matter, some injury to the plaintiff, or benefit to the defendant, in the consideration itself, laid as a ground for the assumption.(*b*) If the defendant had promised to the plaintiff, having possession of the note, and a power to sue for the money (though not in his own name), that if he would forbear to sue him, he would pay it; or, if the promise had been in consideration of his delivering the note up to be cancelled; these promises, though made to a person not having an assignment of the note, would perhaps have been sufficient to ground an *assumpsit* upon. But this is a bare promise to pay to the plaintiff, a stranger, in consideration of a sale and delivery of the note by the payee to him, a consideration moving neither to, nor from, the defendant, and which could not redound either to his benefit or injury. Besides, the promise laid, is to pay to the plaintiff, according to the tenor and

*371]

(*a*) Staple *v.* Hayden, 7 Mod. 12. (*b*) Hamaker *v.* Eberly, 2 Binn. 508.

effect of the note, and the tenor and effect of the note was to pay to Jesserow, or his order, and not to any person to whom he should sell and deliver it. If the note had been payable to Jesserow, or bearer, a *bona fide* purchaser of it might have maintained the action; because such notes pass by delivery; but a note payable to order, must be assigned, to enable the holder to bring the action in his own name.

Bonds, in England, are, every day, assigned, attended with irrevocable powers to sue for the assignee's use. Such an assignment one would think would be full evidence of a sale and delivery, yet no actions are ever brought on that ground, but always in the name of the obligees.

We would intend everything we could to support the verdict; but we cannot intend a consideration quite different from that which is laid, which we must do, in the present case, if we were to give our opinion in favor of the plaintiff.

The judgment, therefore, must be arrested.

Gibbs *v.* Gibbs.

Bankrupt law.

Under the state bankrupt law of 1785, a prior judgment-creditor was not entitled to have the proceeds of a sale of real estate, levied under an execution on a younger judgment, paid to him.

The case was briefly this: A certain Aaron Musgrove had brought a *qui tam* action against the defendant, Ann Gibbs,(*a*) in which, after a trial in the supreme court, he obtained a judgment, on the second day of October 1788; but no execution was thereupon issued. On the fourth day of the same month, however, the defendant having then confessed judgment in this court to the plaintiff, Benjamin Gibbs, a *fi. fa.* was issued in this cause, and duly executed upon a house and lot of ground in Philadelphia; after which, Mrs. Gibbs committed an act of bankruptcy, and the sheriff paid the money levied by virtue of the *fi. fa.* into the hands of the prothonotary, to be disposed of as the court should direct.

In the course of the argument, there were some insinuations of collusion, with respect to the second judgment; but as no proof was offered, the only question before the court was, whether under all *the circumstances [*372
of the case, Musgrove's prior judgment was entitled to satisfaction out of the money levied on the *fi. fa.*, in preference to the subsequent judgment on which the writ had issued? See 3 State Laws 635, § 30.(*b*)

Bradford and *Sergeant*, arguing in favor of the prior judgment, admitted, that it was no lien against the assignees of the bankrupt, or the general creditors under the commission; but contended, that, unless it was for the general benefit, no construction of the act of assembly should be made, to divest the lien which the priority of Musgrove's judgment had obtained; a lien, they insisted, clearly binding as to a purchaser, and, consequently, as to a person levying on real estate, who is to be considered, in that respect, a

---

(*a*) Musgrove *v.* Gibbs, *ante*, p. 216.

(*b*) Act 16th Sept. 1785, entitled, "An act for the regulation of Bankruptcy." P. L. 635.

purchaser. They said, that they had not been able to find any authority more in point than 1 P. Wms. 737; but urged, that the want of a direct precedent was in their favor; for, if the attempt to destroy a lien of this kind could have succeeded, it must frequently have occurred in the uniform struggle that had been made to defeat the bankrupt laws of England.

It was further observed, that there had been no *laches* on the part of Musgrove, for he could not issue an execution until the expiration of four days after his judgment was obtained; that it was established, long before the statute of frauds, that the first judgment shall be first paid, although the execution was issued upon a subsequent one; that the statute and our act of assembly made no other alteration in the common law, than that of substituting the day of docketing, for the relation to the first day of the term; and that, therefore, independently of the bankrupt law, Musgrove's claim was indisputable.

But they also contended, that, taking the bankrupt law into view, it did not interfere between lien and lien, at common law; but is merely directory in the § 30, how the debts shall be paid, where no execution has been levied. The words do not include the case; and a former statute, or rule of common law, cannot be repealed or annulled, by implication. Nor could the intention of the legislature embrace it; for, that was to make an equal distribution among the creditors at large; and not to ascertain a right, as between two individuals. Whether, indeed, it is a real or pretended debt for which the second judgment is confessed, there are no means to prove from the want of a court of chancery; and whether the commissioners might recover the money from Musgrove, is a question, that cannot affect the present controversy, or give Gibbs a right to retain it, which he would not otherwise have.

Ingersoll and *Lewis*, for the plaintiff in the execution, stated, that by the bankrupt law, executions, mortgages, and pledges, were considered in the same light; and that the rule of law in the distribution of a bankrupt's estate, placed all other descriptions of creditors on the same footing, regarding the quantity, and not the quality of their debts. Green, B. L. 100, 101, 136, 146, 190; 12 Mod. 446; Com. Dig. 532; 2 Black. Com. 487; 1 Bac. Abr. 258. They insisted, as the property would indisputably vest in
*373] the commissioners, *if not prevented by the execution, that, therefore, the question lay properly between Gibbs and the assignees, and not between him and Musgrove, who could not, with any show of right, retain the money against the general creditors, even if the court were, at this time, to order it to be paid to him. They said, that the very points now made, were urged and overruled in the case cited for Musgrove; 1 P. Wms. 737, and it is declared in several cases, that a judgment did not bind lands any more than the *teste* of a *fi. fa.* did goods, before the statute. Ibid. 92; Ves. 239, 436.

But the very existence of a prior lien in favor of Musgrove was controverted; because the act of assembly 1 Sm. L. 390, in respect to the docketing of judgments, only alters the law in the case of *bonâ fide* purchasers for a valuable consideration; and does not affect the case of two judgment-creditors, whose liens still relate to the first day of the term. On this ground, therefore, the judgment confessed to Gibbs in the common pleas, is prior to

that obtained by Musgrove in the supreme court; for the term of the common pleas, commenced on the 7th of September; but the term in the supreme court did not commence until the 24th day of the same month; so that, independent of the bankrupt law, the legal relation to the first day of the term establishes the right of Gibbs on the present controversy.(*a*)

But the bankrupt law is in itself clearly decisive; and that an adverse precedent is not to be found, must prove the universal sense of the courts of justice in England to be in favor of the plaintiff's doctrine. As, therefore, the general rule, with regard to an execution executed, includes his case, and excludes the case of Musgrove, it is incumbent upon the latter to show, if he can, any exception on which he may rest his present claim. The principle, indeed, as well as the practice of the law, is on the same side. If, after the execution executed, the commissioners had taken the house and sold it, they would, undoubtedly, have been liable to Gibbs in an action for money had and received to his use: but will it be asserted, that Musgrove could maintain such an action, having no execution executed? Nor can it be justly said, that the commissioners are not interested in the question now agitated; for, if the proceeds of the estate sold under the *fi. fa.* are enough to pay both, both, according to the opposite doctrine, must be paid, and only the balance go to the commissioners. But there is no case which can make a difference whether the money is, or is not, sufficient to pay the amount of the execution; and should Musgrove prevail against Gibbs, for similar reasons he must prevail against the commissioners, to the manifest violation of the words and spirit of the law.

Shippen, President.—The motion in this case is made in behalf of one Musgrove, who is said to be a prior judgment-creditor, in order to have the money which has been levied and brought into court under the plaintiff's execution, paid to him, instead of the plaintiff.

*This is objected to, on the ground that the defendant became a bankrupt previous to the serving or issuing any execution against the estate, except the present one, at the suit of the plaintiff, and, that, therefore, he alone is entitled to the money. [*374

The question arises upon the 30th section of the bankrupt law, which enacts, "That every creditor having security for his debt by judgment, specialty, or other security, whereof there is no execution served and executed upon the lands, goods and estate, of the bankrupt, before such time as he shall become a bankrupt, shall not be relieved upon any such judgment, &c., for any more than a ratable part of their debts, with the other creditors."

This section of the act is similar to one in the statute of James, and must therefore receive the same construction; and the rational and legal construction appears to be, that no judgment-creditor who has not levied his execution, shall receive any benefit from his judgment, as to the estate or effects of the bankrupt, vested in the commissioners of bankruptcy by the act, to the exclusion or prejudice of the creditors at large, but must be put upon the same footing with them; yet, as to any liens which do not affect the general creditors, he will have the benefit of them in the same manner as if the act had never been made.

(*a*) But see Welsh *v.* Murray, 4 Dall. 320, s. c. 4 Yeates 197.

This construction accords with the case cited in support of the motion out of 1 Peere Wms. 737. The principle of that case, so far as respects the present purpose, is this, that where there is a prior judgment, and afterwards a sale of the land, and then a bankruptcy, the purchaser holds the land subject to the prior lien, which must be for this plain reason, that in that case there was no possibility that the creditors of the bankrupt could be prejudiced by it, the land being actually sold before the bankruptcy, and never vested in the commissioners; and, consequently, there was no lien as to them, it could only subsist against the purchaser, and was not at all affected by the bankrupt laws, as it was indifferent to the creditors, whether it subsisted or not.

In the present case, there has been no act of the party, previous to the bankruptcy, to prevent the vesting of the estate in the commissioners; and, consequently, all liens, if they operate at all, must operate to their prejudice; which is contrary to the express intent of the act, which directs that they shall take the estate, subject only to the claims of such judgment-creditors who had levied their executions upon it. For, if any judgment-creditor, who has no execution, under the idea of his having a prior lien, could have the benefit of the execution transferred to him, then not only that creditor, but all the prior judgment-creditors must be satisfied, before the commissioners could take anything to divide among the general creditors, as they would all have an equal right with him.

It is said, that, although the court should order the prior judgment-creditor to be first paid, there would be no injury done to the other creditors, because the commissioners might recover the money from him, if he was not entitled to it. Whether they could, *or could not, recover it from him, will, I think, make no material difference as to the present motion. It must, however, be observed, that, if he can claim this money at all, it must be under the execution, and as execution-creditors are saved, it would be very questionable, whether the commissioners could recover it from him. If they could not, then the creditors at large must be postponed to him and the other judgment-creditors—if they could recover it, then, it would not only be a vain thing to order the money into his hands, as he must, by a circuity of action, be obliged to refund it, but it would, in fact, be ordering it into the hands of a person not entitled to receive it; and the consequence would be, that the real execution-creditor, whose claim is saved by the act, would infallibly be cut out of his preference.

*375]

Whether this is, or is not, a *bonâ fide* debt, is not the subject of our present inquiry. If any fraud could be proved, this court would certainly, on motion, set aside both the execution and the judgment, but that could not be for the benefit of the prior judgment-creditor, whose claim is founded upon the execution; but for the benefit of the creditors at large, under the commission; who may still have a remedy by action, if they can show the execution to have been collusive and unfair.

The only question, however, now before us, is whether a prior judgment-creditor shall come in under this execution, which, we think, he cannot, as it would defeat the express intent of the bankrupt law.(*a*)

(*a*) See Ralston *v.* Bell, 2 Dall. 158; White *v.* Hamilton, 1 Yeates 188.

McClenachan *et al. v.* McCarty.

Writ of inquiry.

The defendant in a foreign attachment is not entitled to produce his evidence before the jury of inquiry.

This was a foreign attachment, in which judgment was entered at the third term; and a writ of inquiry being afterwards executed, a motion was made on behalf of the defendant, to quash the return, because the sheriff and inquest had refused to hear his evidence, at the time of executing the writ.

On the argument, the nature of the evidence that had been excluded, was stated, and *Ingersoll*, in support of the motion, contended: 1st. That, upon general principles, both parties are entitled to be heard before the inquest; and that, although they are bound to find some damages, yet, if there is no proof of any being sustained, they will find no more than a single penny; and that merely to satisfy the form of the proceeding. The writ commands the inquest diligently to inquire what damages, &c., so that to inform their consciences, they ought certainly to hear the allegations of both parties; and if they assess the damages too high, or too low, their return will be set aside, which proves that the court has a superintending power over juries of inquiry. 2 Lill. Abr. 721; 2 Sayer's Law of Dam. 123, 193, 203, 233. It is a maxim, indeed, that damages cannot be assessed without a jury (3 Bl. Com. 395, 396–7); *and it is clear, that under the rules at *nisi prius*, a [*376 defendant may submit to judgment being entered, and yet contest the matter before the jury of inquiry, so as to affect the *quantum* of damages, for which the judgment shall stand. 2d. The case of a foreign attachment makes no exception to the general rule. In London, only actions of debt can be brought, within the custom; so that the judgment being complete, no damages are to be assessed. There are many other points in which the custom of London differs from the practice under our attachment law. Lands, and, in short, every other subject of property, are liable, in Pennsylvania, to an attachment; being as much so, in his absence, as the defendant's person would be, if he were here. But the custom of London proceeds only on the supposition of a debt due from the garnishee to the defendant. Hence, the analogy between the custom there, and our practice, is very trifling. The act of assembly does not prescribe a writ of inquiry; nor does the freeholders' law, upon a judgment by default, after summons; yet, in both cases, writs of inquiry are uniformly issued to assess damages; and for the plain reason already assigned, that damages cannot be assessed without the intervention of a jury. Besides, it has been the uniform practice, under the attachment law, to give notice of executing the writ; which necessarily implies a right to controvert the *quantum* of damages; and the question is not, whether the evidence would have availed, but whether it ought to have been heard.

Wilson and *Wilcocks*, for the plaintiffs.—It is in the power of the defendant to appear, and entitle himself to a trial in court; but it would be unjust, in this manner, to permit him to draw the decision of an important question from the proper tribunal. Admitting, however, that the law is what the defendant's counsel states, where a party is completely in court, and after-

wards suffers judgment to go by default, it is not applicable to the case of an attachment, the object of which is to compel an appearance. The custom of London, which is certainly the ground-work of our attachment law, admits no such privilege as the defendant now claims. In London, the plaintiff is not obliged to execute a writ of inquiry, nor to prove his debt in court, but merely to swear to it; nor does any expression in our act of assembly enjoin the execution of a writ of inquiry; but that, as well as the notice in office, depends entirely upon usage; for the only trial mentioned in the act, is on the *scire facias* between the plaintiff and garnishee. Nor does the legislature precipitate the cause: judgment cannot be entered until the third term, and twelve months afterwards are given to obtain a trial upon the merits. In this action, likewise, the plaintiff acquires no general lien by his judgment, as in other actions, but can only issue execution against the property attached; so that, upon the whole, there can be no reason, on principles of equity, that the defendant should be heard, without putting in special bail. The freeholders' act can furnish no argument; for the law in
*377] that case prescribes a mode by which *the defendant shall be brought into court; but in an attachment, the defendant is never in court, until bail is filed.

Shippen, President.—That is a motion to set aside the inquisition of a jury of inquiry in a foreign attachment, on the ground of the defendant's evidence being refused to be heard before the sheriff and inquest, on the execution of the writ of inquiry.

On the part of the plaintiffs, two points have been made and argued:

1st. That on the execution of writs of inquiry generally, no evidence on the part of the defendant ought to be heard, as by suffering judgment to go by default, he had admitted the plaintiff's cause of action; and that, therefore, evidence on the part of the plaintiffs only should be heard.

2d. That, although it were admitted, that, generally, on executing writs of inquiry, after an interlocutory judgment, such evidence might be heard; yet, in those cases where writs of inquiry are executed to ascertain the plaintiff's demand, after judgments on foreign attachments, no such evidence should be admitted; because the foreign attachment issues only to compel an appearance, and the defendant has it in his power, even after the return of the inquisition, by entering special bail, to try the cause in the usual manner, before a court and jury.

As to the first point, the law seems settled, that, after a judgment by default, the defendant has a right to offer his evidence to the jury of inquiry, to combat the plaintiff's proofs; and that where the sheriff refuses to hear the evidence on both sides, the court will direct a new writ of inquiry.(*a*)

As to the second point, it will be necessary to consider the law of attachments of 1705, and the practice under it, together with the reasons and extent of that practice.

The legislature, in framing this act, certainly took for their model the custom of London, concerning foreign attachments; the principles of the law and mode of proceeding are in many respects conformable to that custom; and the difference appears to be less in the act itself, than in the

(*a*) See Moore v. Hess, 4 Yeates 261.

practice under it. In London, the proceeding is by plaint against the defendant, supported by the oath of the plaintiff; on this is founded the attachment and proceedings against the garnishee; but no further proceeding is had against the defendant, until he enters special bail, and then a declaration is filed and a trial had in the usual way. The practice under our act is, first to obtain judgment against the defendant, then to file a declaration against him, according to the nature of the demand; if in debt, the judgment stands for the sum declared for, without even an oath to support it;(*a*) if in case, a writ of inquiry issues, for a jury to ascertain the demand, and then the *scire facias* issues against the garnishee. No actual notice is given to the defendant of the execution of the writ of inquiry; his attendance is never expected, and *is, in most cases, impossible. It seems to be a mode adopted, not for a trial of the merits, but only to [*378 conform to the nature of an action on the case, which requires a jury of inquiry to ascertain the sum for which the execution is to issue; and it may be considered as a proceeding to inform the conscience of the court, in the room of the supposed oath in the action of debt.(*b*) In its nature, it appears to be an *ex parte* proceeding, and not within the reason of the rules in executing writs of inquiry on judgments by default; where the defendant has regular notice, and has no other opportunity of making a defence.

The attachment law, and all proceedings under it, suppose the defendant to be an absent person, and he has, in truth, no day in court, until he enters special bail, and thereby dissolves the attachment; or comes in afterwards, when the money is recovered from the garnishee, to disprove the debt, which is done by a *scire facias ad disprobandum debitum;* in either of which cases, he puts the plaintiff upon the legal proof of his demand, and is admitted to make a full defence.(*c*) The right of making that defence before the jury of inquiry, has no foundation either in the act or the practice under it. The law supposes, from his absence, that he is then incapable of making a defence; and for that reason, has afforded him ample time and opportunity afterwards to do it; nor does it accord with legal ideas, that he should have this opportunity of trying his cause, and also another afterwards upon entering special bail.

It has been said, that notice of executing these writs of inquiry has been usually set up in the prothonotary's and sheriff's offices; and that this notice would be in vain, if the party might not appear and make his defence. This practice of putting up notices, must have been introduced by the gentlemen of the law *ex majore cautela.* If it were a new case, we should perhaps think it nugatory; as a person abroad cannot be supposed to take notice of a paper put up in the office, which he could never see. However, as it *is* the practice, it is proper it should be continued; and it may, at least, serve the purpose of giving the garnishee, or the attorney in fact of the defendant, an opportunity of knowing, and apprising his constituent, of the nature of the plaintiff's demand, that he may be prepared to defend himself against it.

(*a*) In Pancake *v.* Harris, 10 S. & R. 109, it was said by the court, that the act of 1806, which directs proceedings by action of *debt*, is inapplicable to the case of a foreign attachment.

(*b*) See Pancake *v.* Harris, 10 S. & R. 109.

(*c*) Brealsford *v.* Meade, 1 Yeates 495; Fitch *v.* Ross, 4 S. & R. 565.

Elliot v. Elliot.

Upon the whole, we are of opinion, that the refusing to admit the defendant in the attachment to produce his evidence before the jury of inquiry, is not a sufficient reason for setting aside the inquisition.(*a*)

Rule discharged.

Penrose *v.* Hart.

Application of payments.

Mode of applying partial payments on a bond bearing interest.

On a rule to show cause why the judgment confessed by warrant of attorney in this case should not be opened, *Fisher* stated, that several partial
*379] payments had been made by the defendant, *which the plaintiff had applied first to the discharge of the arrearages of the interest; whereas, he insisted, that it ought first to have been deducted from the principal debt. But—

Shippen, President, said, that the practice had been otherwise; and he thought with great reason and propriety. He remembered to have heard of an old decision when Logan was Chief Justice,[1] in which it was expressly settled, that money paid on account of a bond, should first be applied to discharge the interest due at the time of the payment, and the residue, if any, credited toward satisfaction of the principal. By this rule, the gentlemen of the bar had uniformly governed their calculations, before the revolution.

Lewis, for the plaintiff, insisted, that the practice was the same at the present day, and appealed to the attorneys in court, who confirmed his assertion.(*b*)

O'Neil *v.* Chew.

Foreign attachment.—Sale of chargeable property.

Foreign attachment. The defendant's interest being attached in a shallop, *Levy*, after filing a positive affidavit of the debt, moved, at the first term, that the shallop might be sold, as a chargeable commodity: And the motion was accordingly granted.

Elliot *v.* Elliot.

Amendment.

There was an agreement filed in this action, to refer the matter in dispute to one *Levis;* but in the official rule, by mistake of the clerk, the name inserted was *Lewis*.

After report, *Sergeant* moved to amend the rule, by the agreement filed: and leave was accordingly given.

(*a*) See Moore *v.* Hess, 4 Yeates 261.

(*b*) See Tracy *v.* Wikoff, *ante*, p. 124 and the cases there cited.

[1] James Logan was appointed Chief Justice of Pennsylvania, by Lieutenant-governor Gordon, on the 10th of August 1731. 3 Colonial Records, 412. He resigned on the 6th August 1739, and was succeeded by Jeremiah Langhorne, 4 Id. 348.

WEAVER *v.* LAWRENCE.

Inquisition.

Where an inquisition upon lands, under a *fi. fa.*, has been quashed for irregularity, the sheriff may proceed to hold a new inquest, after the return of the *fi. fa.*, without a new writ.

THERE had been a levy upon lands, by virtue of a *fi. fa.* issued in this case, returnable to the present term; and now, on *Levy's* motion, the inquisition, which had been held upon the value of the lands, was quashed.

It then became a question, whether a new *fi. fa.* must be issued; or whether the sheriff might proceed, after the return of the former writ, to take a new inquisition, without further process?

SHIPPEN, President.—I cannot perceive anything in the act of assembly which precludes the sheriff from holding an inquest, after the return of the *fi. fa.*; and I have always understood it to be the *practice to do so. [*380 The present inquisition, being quashed for irregularity, becomes a nullity, and leaves the case just as if none had been taken.(*a*)

PLEASANTS *v.* MENG *et al.*

Bankruptcy.—Dissolution of partnership.

Under the state bankrupt law of 1785, evidence was admissible, to show that the certificate was unfairly or illegally obtained.

A bond taken subsequently to the act, though upon a contract which arose previously to it, warranted the issuing of the commission.

A petition subscribed by one of two partners, in the name of himself and partner, was a legal ground for issuing a commission.

An assignment of the partnership effects is not an actual dissolution of the partnership, if the joint transactions are not at an end.

Indebitatus assumpsit for goods sold and delivered, &c. The defendants pleaded that they were certificated bankrupts, and that the cause of action arose before the bankruptcy; to which the plaintiff replied, that certificate was *unfairly* obtained; and on the trial of the cause, offered testimony in support of the four following exceptions, to wit:

1. That the debt on which the commission was founded, had been contracted prior to the passing of the act for the regulation of bankrupts (3 State Laws, 644[1]) although a bond had been given for it, since the act was passed.

2. That the petition was exhibited by one person, in the name of himself and his partner, without any other than the general authority of the partnership; which is not sufficient for the purpose.

3. That the defendants were not copartners at the time the commission issued jointly against them. And—

4. That two of the defendants had not committed any act of bankruptcy, prior to the issuing of the commission.

The admission of testimony upon these points was opposed by the coun-

---

(*a*) See McCormick *v.* Meason, 1 S. & R. 92; Miller *v.* Milford, 2 Id. 35.

[1] Act 16th September 1785, P. L. 644.

sel for the *defendants*, who contended, that the certificate was conclusive evidence of the debt, trading, bankruptcy and conformity; and that fraud in obtaining it, or a concealment of effects, were the only matters which the plaintiff could now be allowed to prove, according to the decisions under the 5 *Geo. II.*, *c.* 30, which statute only differs, on this point, from our act of assembly, by the use of the word *fraudulent*, instead of *unfairly;* words, however, of synonymous import. 3 State Laws, 644, § 24; Green B. L. 244, 245–9; 1 Str. 533; Co. B. L. 352; 1 Atk. 79, 208; 2 Wils. 140. They urged, that any objections to the form of proceeding could only be taken by the bankrupts, who were likewise precluded by their acceptance of a certificate. 2 Str. 746; 5 Burr. 2628; 1 Term Rep. 409. And they controverted the power of the court to unravel, in this way, the decision of the commissioners, whose jurisdiction was competent and conclusive as to all the preceding steps.

The *plaintiff's* counsel, having premised, generally, that where a limited jurisdiction is established, the courts of common law are bound to prevent any infraction of that limitation (3 Black. Com. 112, 109); and that a court of limited jurisdiction can never be vested with a right to determine upon the legality of its own acts (Ibid. 112, 114; 1 Bac. Abr. 563; Sir T. Raym. 189; Salk. 548; 1 P. Wms. 476; Cowp. 26), contended, that the common pleas had a concurrent authority with the supreme court to restrain the com-
*381] missioners of bankrupts within the boundaries prescribed by the act of *assembly; and that if there was no express provision in the act of parliament in England, or in the act of assembly here, as to the mode of ascertaining a violation of those boundaries, yet by analogy to other special jurisdictions, the proceedings of the commissioners could not be the proof of their own legality; but, from the nature and reason of the thing, that question must be examinable at another tribunal. 1 Bac. Abr. 653; Lev. 288; Cas. temp. Hard. 186, 145; 2 Bl. Rep. 1145; 2 Wils. 582. They remarked, that, until the 4 *Ann.*, *c.* 17, § 7, no provision was made as to the manner in which a bankrupt should bring forward his discharge; and that, even under that statute, he was obliged to set forth all the proceedings before the commissioners, which eventually produced the statute of 5 *Geo. II.*, authorising the defendant to plead his certificate. This, however, they insisted, only made the certificate *primâ facie* evidence; relieving the defendant from the necessity of stating the petition, trading, &c., in his plea, and obliging the plaintiff to set forth his exceptions in his replication. See 2 Ld. Raym. 1646; Str. 869; s. c. Co. B. L. 356; Doug. 160. They then cited many authorities to show, that since, as well as before, the statute of 5 *Geo. II.*, *c.* 30, and subsequent to the granting the certificate, as well as previously, the debt, trading, act of bankruptcy, &c., had all been controverted and inquired into in the courts of law, in a variety of forms, between a creditor and the bankrupt, between creditors and the assignees; and, in short, between any persons who were interested. 2 Str. 744; Cowp. 569; Bull. 37; Co B. L. 307, 314; 1 Term Rep. 409, 573, *n.*; 2 Str. 822; 2 Id. 1042; Barn. 81; 2 Bl. Rep. 725; Cowp. 823; Co. B. L. 348; 1 Ld. Raym. 724; 1 Bl. Rep. 70; Bull. 40; Palm. 325; Cowp. 427, 428; 1 Salk. 110; Cowp. 398; Bull. 39; 1 Atk. 201; Co. B. L. 71; Cro. Eliz. 13, 72; Barn. 160; 2 Str. 809; 7 Vin. 61, pl. 14; 1 Bl. Rep. 441; Co. B. L. 74; Green B. L. 44; 1 Burr. 467, 484, &c.

They added, that to prevent the injustice which, in many cases, would happen for want of a court of chancery, the courts here are obliged to deviate from the rigorous rules of the common law, and to adopt the principles of equity. Although in England the common-law courts cannot inquire into the consideration of a bond, or decree the specific performance of a contract, yet the courts of equity will do both; and here, to afford a similar relief, wherever the chancery would order a deed to be given, our courts, instead of doing that, presume the deed to have been actually given, and adjudge the case accordingly. Thus, in the present case, the same reasons which would induce the chancellor to supersede a commission of bankrupts, will induce this court to consider the commission as virtually superseded.

SHIPPEN, President.—This is an action brought by Samuel Pleasants against John Meng, and three other persons, in which the defendants have pleaded, that they are certificated bankrupts, and the plaintiff has replied, that the certificates were unfairly obtained. *If the plea had been drawn up at large, instead of being entered on the docket, it must have been [*382 pursuant to the act of assembly, "that the cause of action did accrue, before such time as he became a bankrupt;" and the certificate is made by the act only a matter of evidence.

The question now to be decided, is, whether, upon a trial at law, the creditor of a bankrupt may give evidence to controvert the trading, bankruptcy and conformity? Or, whether the certificate is conclusive proof of all the proceedings before the commissioners? And in this case, it is fortunate, that the act of assembly nearly pursues the words of the statute of 5 *Geo. II.*, *c.* 30, for the analogy of the law must greatly strengthen the application of the authorities, and facilitate the decision of the court.

The clause, on which the argument arises, is thus expressed, both in the English statute, and the act of Pennsylvania: "And in case such bankrupt shall afterwards be impleaded for any debt due before he became a bankrupt, such bankrupt shall be discharged upon common bail, and may plead, in general, that the cause of action did accrue before such time as he became a bankrupt; *and* the certificate of such bankrupt's conforming and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate, unless the plaintiff can prove the said certificate was obtained unfairly, or make appear any concealment by such bankrupt to the value of fifteen pounds."

Certain it is, that from the 13 *Eliz.*, *c.* 7 (at which time commissioners of bankrupts were appointed in England), until the passing of the 5 *Geo. II.*, a period of about 200 years, there is no instance that ever the proceedings of the commissioners, when called for, were not revised and corrected in the courts of law. By the statute 5 *Geo. I.*, *c.* 24, the bankrupt's certificate might be given in evidence, and was directed to be a full discharge of any action that should be brought by any creditor of such bankrupt; yet, it appears by the case in 1 Str. 533, that it was still necessary to prove the act of bankruptcy, besides producing the certificate; because the words, *such bankrupt*, related to such person as was described in the statute. Under that statute, therefore, the certificate was so far from being conclusive evidence, that it was not sufficient, without other proof, to show that he

was an object of the act, by being a trader, and having committed an act of bankruptcy.

What then was the alteration introduced by the 5 *Geo. II., c.* 30? It had been found very inconvenient to compel a bankrupt, as often as he was sued, to enter into a proof of all the circumstances which had already been proved before the commissioners: this statute, therefore, enacted, that "the certificate should be sufficient evidence of the trading, bankruptcy, commission," &c., and here, *ex vi termini*, we must infer that this was not the case before, as the word *sufficient* naturally respects what had been hitherto *insufficient*. The statute, however, does not declare, that the cer-
*383] tificate shall be *incontrovertible, or conclusive evidence, but, in rendering it sufficient evidence of certain facts, which the bankrupt was before under the necessity of establishing by specific proofs, it has merely transferred the burden from him to the creditor, with whom it now lies to prove, according to the terms of our act of assembly, that the certificate was unfairly obtained.

That the certificate was unfairly obtained, is, indeed, an expression attended with some ambiguity; but it must have respect to the subject-matter, which was the trading, bankruptcy, commission, &c. And if a man had not been a trader, or, if he had not committed an act of bankruptcy, it was *unfair* to grant him a certificate: so that *unfair* is tantamount to *illegal;* holding equally with the converse of the proposition, that a certificate illegally, must be unfairly, obtained.

If the parliament of England intended to make so essential a change in the bankrupt system, as to leave the proceedings of the commissioners without control or appeal, it would be strange, that no stronger, no clearer expression, was employed for that purpose; and, if such was indeed their sense, it must appear still more strange, that the courts of law have been so far from understanding it, that in every case, since the passing of the statute, they have permitted the same investigation which was before allowed. In Cowp. 823 (*Martin* v. *O'Hara*), it appears, that a bankrupt, having obtained a certificate under a second commission, pending a former one, under which a certificate had been refused, an application was made for an *exoneretur* to be entered on the bail-piece; but the judges pronounced the second commission to be absolutely void, and discharged the rule to show cause. Now, if the certificate were conclusive, this decision was illegal; for the certificate is as much evidence of the commission, as of the trading and bankruptcy; and its validity was a question equally before the commissioners, whose sanction it had received.

It is clear, therefore, in every view, from the words of the law, and from judicial interpretations of its meaning, that the legislature has only made the certificate evidence; and the nature of evidence necessarily implies an adverse right to controvert and repel. A foreign judgment is allowed to be *primâ facie* evidence of a debt, and yet it was adjudged to be open to examination; for as I have already hinted, although some kinds of evidence are stronger than other kinds, yet, in that respect, they are all placed on the same footing. *Walker* v. *Witter*, Doug. 1.

But there is a general consideration, independently of the act of assembly and the authorities; which is, that the matters determined by the commissioners are certainly matters of law, arising from the facts; as, what

avocation constitutes a trader, or what conduct amounts to an act of bankruptcy: would it not then be a strained and unreasonable thing to suppose, that the legislature has established a jurisdiction of this sort, competent to decide questions of the greatest magnitude in their operation, and yet, that *there should be no appeal to examine its proceedings, no power to correct its errors? We are happy, indeed, in knowing that our decisions, if erroneous, may be rectified in the supreme court; the adjudications of which are also liable to the ultimate scrutiny of the high court of errors and appeals. And, I repeat, is it not absurd, therefore, to imagine that the limited jurisdiction of the commissioners of bankrupts is alone exempted from control; or, that men, unskilled in jurisprudence, however upright in their general conduct, and intelligent in their particular arts and professions, should enjoy an absolute authority in the discussion and determination of every nice point of law, which is incident to the extensive and intricate investigations of the bankrupt system? [*384

For these reasons, the COURT are unanimously of opinion, that the evidence offered by the plaintiff, ought to be received.(*a*)

The case, upon the evidence, appeared to be this: The defendants, John Meng, William Goodwin, James Smith and Robert Cumming, had been copartners in trade under the firm John Meng & Co. On the 26th of April 1785, Goodwin alone, in the name of himself and his partners, executed an assignment of all their personal property, to Curtis Clay *et al.*, in trust for the benefit of the partnership creditors: and on the 30th of the same month, he executed another assignment, in the same form, and for the same use, of all the real estate of the company. On the 25th of June following, a third assignment was executed by Meng, Goodwin and Cummings, of all the real and personal estate of the partners, to trustees, for the same use; at which time, the defendants were indebted to the plaintiff (among others), and to Messrs. Rose & Dickens (who afterwards became the petitioning creditors), to a considerable amount. After these transactions, about the beginning of July 1786, Meng opened a store in Philadelphia, under the old firm of John Meng & Co., in which, however, the messenger of the commissioners only found a small quantity of soap, and a bundle of paper money; but Cummings was gone to Georgia to collect debts, under the direction of the assignees, and Goodwin and Smith resided and kept a store at Cooper's Ferry, in New Jersey. On the 1st of August 1786, a joint commission of bankrupts against all the four partners, as traders by retail, issued upon the petition of Rose, who alone subscribed it, in behalf of himself and his partner Dickens, having previously sworn that John Meng & Co. were indebted to them on a bond bearing date the 8th of July 1786, payable on the 15th of the same month; which bond, it was admitted, had been given for the precedent debt due at the time of the assignment of the 25th June 1785. It was also agreed, that Meng and Cummings *had committed acts of bankruptcy; and with respect to the other two partners, it appeared from the minutes of the commissioners of bankrupts, that the sheriff's officer, [*385

(*a*) See Blythe *v.* Johns, 5 Binn. 249; a case under the act of congress respecting bankruptcy—where C. J. TILGHMAN cites this decision of President SHIPPEN, with approbation.

having a *ca. sa.* against all four, at the suit of Rose & Dickens, had made inquiries for Smith and Goodwin, at the place where Meng kept his store in Philadelphia, and at the ferry-house from which they usually crossed to New Jersey, but could not find them; that they had requested the ferry-man to keep a boat in readiness for them, for fear of a writ being issued against them; that the ferry-man, observing the approach of the sheriff's officer, gave them notice; that, thereupon, they concealed themselves in the ferry-house, saying, that they did not like to go to jail, but would be able to pay all their debts; and that, soon afterwards, they crossed the river to elude the pursuit of the officer.

On these facts, the *plaintiff's* counsel contended: 1st. That the debt of the petitioning creditor was not within the bankrupt law, which provides, that the debt, on which the commission issues, "shall have arisen upon a contract or transaction subsequent to the passing of the act." (3 State Laws, 644, § 3.) But here the bond could be given for no other purpose than to make the defendants bankrupts; and although it may extinguish, it cannot change the original nature of the debt. The doctrine of extinguishment at common law, is, indeed, more limited than the adverse counsel will admit; for although a security of a superior nature will alter the remedy, the debt itself remains. 6 Co. 44; 1 T. Rep. 17; Barn. 81; 2 Str. 1042; Cases temp. Hardw. 267. And the doctrine which applies in the last case to support the commission there, applies to prove the invalidity of the one at present in controversy. Besides, an act between obligor and obligee, that tends to the injury of other persons, the law deems a fraud, by which, so far, at least, it is vitiated and annulled. 1 Burr. 474; 3 Co. 80. The bond of the petitioning creditor, therefore, taken in every point of view, was insufficient to found a commission; for, whether it was given without a consideration, or in consideration of a precedent debt, it is equally contrary to the act; and if it is regarded as a fraudulent collusion between the petitioning creditor and the bankrupts, although it may be obligatory upon them, it is void as to a third person. See 1 Term Rep. 406; Doug. 282.

2. The petition and affidavit of Rose alone, notwithstanding it is said to be on behalf of himself and his partner Dickens, was also irregular and illegal. There are, perhaps, no express decisions on this point; but upon general principles, he who acts for another must show his authority; and in the case of partners, for a purpose of this nature, all must subscribe the petition or delegate an express power to another for doing it in their name; a point already determined in this court, in the case of *Gerard* v. *Basse et al.* (*ante*, p. 119). This is not an act that can be in contemplation in the business of a partnership; and the reason is the stronger against allowing it,

*386] *as a bond must be given by the petitioning creditor. 3 State Laws, 644, § 3.

3. But the commission itself had issued erroneously and illegally; for the defendants were not partners, at the time it issued; and a joint commission can only issue against partners. The assignment of the 25th of June 1785, divested all their partnership stock, and, consequently, dissolved their joint connection; for partnerships may be dissolved by tokens, &c., or, they necessarily cease with the objects of their institution. 1 Domat, lib. 1, tit. 8, par. 10, 11, § 5, p. 155. But although there was no forma dis-

solution of the partnership, it is clear, that the second trading was merely colorable, for the purposes of a bankruptcy; and they are described to be traders by retail, which cannot relate to their former general partnership, but to the recent colorable trading. To carry on business, after a man's effects are gone, is, in itself, a fraud. Co. B. L. 80, 81, 82; 1 Burr. 478; 2 Black. Rep. 996, 362.(*a*)

4. In a joint commission, all the parties must have committed acts of bankruptcy. Co. B. L. 4; 1 Atk. 97. The certificate, therefore, can be of no avail, at least, as to Goodwin and Smith, who never committed acts of bankruptcy. In crossing the river, although they said it was to avoid an arrest, they were only returning to their home; and absconding, in order to constitute an act of bankruptcy, must be from the usual place of abode, where the party does business; which, in the present case, was in New Jersey, whither they retreated, and not in Pennsylvania, where the writ issued. In Co. B. L. 71, it is said, that, if a man flies from the state to which he belongs, this is an act of bankruptcy: but here the parties did not fly from, but to, their state or home; and a denial, or keeping house, to bring a man within the act must be at his own place of residence, not at the residence of another person. Ibid. 74. Nor can an act be made an act of bankruptcy by analogy; it must be such as is within the law; and there is no case, where a stranger, in another state, has been deemed a bankrupt, for returning to his home, in order to avoid an arrest where, probably, he could not obtain bail; or for a temporary concealment in another's house for the same reason.

The counsel for the *defendant* stated, that, if the present objections were successful, they would be equally fatal to almost every other certificate which had been granted under the act of assembly; for, nine out of ten of the commissions of bankrupts had originated in the same manner, upon debts either revived by new securities, or created in concert for the occasion. They then contended: 1. That the original simple-contract debt was merged in the bond (6 Co. 44); that if both parties agree to bring the debt in this shape within the act, the proviso in the third section is satisfied; and that the bond was not taken after the bankruptcy, which distinguishes this from the case in Rep. temp. Hardw. 267.

2. That, on the second point, the act of one partner is the act of all in commercial matters; that one partner may bring a suit at law *for the joint debt, or hold the defendant to bail, upon his sole affidavit; [*387 and that the case of *Gerard* v. *Basse et al.* does not apply, as it did not turn upon a commercial transaction, but upon an instrument under seal, which can only bind the person that executes it.

3. That there was no dissolution of the partnership between the defendants; that the store kept by Meng, in Philadelphia, was evidently, from the testimony, a continuance of the old connection; and that the amount of the joint-stock, whether large or small, could not affect the question. See 1 T. Jones, 141.

4. That all the defendants were inquired for, where they carried on their trade, at Meng's house; that Smith and Goodwin denied and concealed themselves at the ferry-house, and expressly said, that they were going off

(*a*) See Pothier, sur le Contrat de Societe, p. 185.

to avoid the arrest; that an absconding out of the state, equally affects a stranger and an inhabitant; and that even a departure, with an intent to delay a creditor, is a sufficient act of bankruptcy. See 2 Str. 809; Palm. 125; Co. B. L. 74.(*a*)

The President, having again noticed the cause of action, and the state of the pleadings, proceeded in delivering the following charge to the jury:

SHIPPEN, President.—A bankrupt law, in a trading country, must be productive of many benevolent and beneficial consequences. When an unfortunate trader has fairly and honestly surrendered all his property for the use of his creditors, the legislature certainly intended, that he should be effectually discharged from all his debts, and left at liberty to acquire new substance; and there are many instances in England, where, by this encouragement, bankrupts have been enabled, not only to extricate themselves and their families from the calamities that oppressed them, but to indulge an honorable disposition in paying those obligations, from which they were thus, by law, exonerated.

It has often happened, however, that, on the other hand, the bankrupt acts have been perverted to the iniquitous purposes of fraud and embezzlement; and therefore, it is requisite, that, on every occasion, the strictest scrutiny should take place. With this view, our act of assembly, corresponding with the English statute, directs commissioners to be appointed, who, having received the necessary proofs of the party's being a trader, and of the commission of an act of bankruptcy, are amply empowered to investigate the bankrupt's conduct, and to compel a disclosure and surrender of all his property; and when this is satisfactorily done, they are authorised and required to grant him a certificate of his conformity to the law. In England, this certificate (which, when fairly obtained, is a complete discharge and release from all the former debts *of the bankrupt), can-
*388] not be granted, without the consent of four-fifths in value of the creditors; but in Pennsylvania, the granting it rests entirely with the commissioners; and there is no check upon its operation, but that it must be first allowed by the president of the supreme executive council, under the great seal of the commonwealth.

In the case under consideration, the commissioners have granted, and the president has allowed, a certificate in favor of the defendants; but four exceptions have been taken to the proceedings on which the certificate is founded, in order to maintain the plaintiff's action, which is brought for the recovery of a debt contracted before the act of bankruptcy. The court being of opinion, that the evidence in support of these exceptions ought to be submitted to the jury, it now only remains to consider, whether the exceptions themselves are sufficient, in law, to defeat the benefit which the defendants claim from the certificate.

1. In the first place, it is said, that the debt of the petitioning creditors, was not such as warranted the issuing of the commission; for it was contracted before the act of assembly for the regulation of bankruptcy, although

---

(*a*) My absence from court during a great part of the defence, unfortunately prevents my stating it more at large. What is here published, is principally taken from the arguments of Mr. Fisher.

a bond of a subsequent date was given for it: and the plaintiff's counsel have contended, that this relation between the bond and the former debt is sufficient to take the case out of the act. On the part of the defendants, however, it is insisted, that the original debt was extinguished by the bond, which they allege, is the creation of a new debt, so as to satisfy the provisior. in the 3d section of the law.

The general doctrine of extinguishment is, at this day, well settled and understood. If a creditor upon a promissory note, or book-account, accepts a bond for the amount from his debtor, this, being a security of a higher nature, extinguishes the first debt, and the creditor cannot afterwards sue upon the note or account, but must proceed for the recovery of his money upon the bond alone.(*a*)

There is, however, no authority precisely in point to the question now agitated; but the determination in Cases temp. Hardw. 267, is thought by the plaintiff's counsel to be in a great degree analogous. On that occasion, a bond had been taken, after an act of bankruptcy (of which the obligee had no notice), for a simple-contract debt due before, and as any debt that accrues after an act of bankruptcy is not entitled to a dividend, the chancellor there considered the debt, as it originally stood, in order to give the benefit of it to a creditor, who would otherwise have been excluded, without any default on his part, from a distributive share of the bankrupt's effects. This case, therefore, it is objected by the defendant's counsel, must have depended upon the peculiar circumstances in which it was involved; and that this appears the more evidently, as Lord Hardwicke expressly says, that, between the parties themselves, the bond would operate as an extinguishment of the precedent debt. There can be no doubt, indeed, that many of the cases on this subject have been determined by the particular circumstances that attended them; *for we find, that a transaction of a similar nature with that just cited, but presented in a different point of view, was decided directly the other way. 1 Term Rep. 715. A bankrupt, after an act of bankruptcy committed, had given a bond with warrant to confess judgment to one of his creditors for a debt due before the act of bankruptcy; the judgment was entered and a *ca. sa.* issued. Afterwards, the bankrupt obtained his certificate, and moved to be discharged from this execution, alleging the cause of action arose prior to the act of bankruptcy; but the court in this case decided, that the bond was an extinguishment of the old debt, and, accordingly, denied the motion. (*Birch* v. *Sharland.*) [*389

But there are many reasons which might be urged to distinguish the present case from that determined by Lord Hardwicke. When the bond was given by the defendants to Rose & Dickens, no act of bankruptcy had been committed; no dividend was to be claimed; no persons, but the parties themselves, were interested; and, as nothing appears to preclude the idea that this was a voluntary exchange of securities, certain it is, that after the acceptance of the bond, Rose & Dickens could never have recovered upon

---

(*a*) See Musgrove *v.* Gibbs, *ante*, p. 216; Latapie *v.* Pecholier, 2 W. C. C. 180; Charles *v.* Scott, 1 S. & R. 294; Watts *v.* Willing, 2 Dall. 100; Wilson *v.* Hurst, Peters C. C. 441; Axers *v.* Mussleman, 2 Bro. 115; Roberts *v.* Gallaher, 2 W. C. C. 191; Hart *v.* Boller, 15 S. & R. 162; Leas *v.* James, 10 Id. 107; Brown *v.* Jackson, 2 W. C. C. 24; Parker *v.* United States, Peters C. C. 262.

the original debt. In all these respects, therefore, there is a material difference between the authority cited, and the case in controversy—a difference which seems strongly to support the argument of the defendant's counsel, that the bond was an extinguishment of the preceding debt.

Even, however, if the law is doubtful, from the frequency of the practice of entering into voluntary bonds, for the very purpose of obtaining a commission, I should be unwilling to recommend it to the jury, on that ground alone, to invalidate the certificate: and therefore, as we have indeed no positive rule to guide us, but the whole rests on an implication arising from the cases, the jury must decide for themselves. I will only add, on this objection, that the legislature probably introduced the proviso in the third section (with, I presume, a view particularly to foreigners), in order to evince, that it was not intended to abrogate all former contracts and obligations: and as it is only the debt of the petitioning creditor that must be subsequent to the passing of the act (for the commission having issued, all debts prior, as well as subsequent, are included), no great mischief can ensue from this restriction, or from the method which has been generally taken to bring the debt of the petitioning creditor within the words of the law.

2. The second objection is, that a petition subscribed by one of two partners, in the name of himself and partner, is not a legal ground for issuing a commission; and this is said to be supported by a decision of this court, in case of *Gerard* v. *Basse et al.* (*ante*, p. 119). There can be no doubt of the legality of that decision. A bond is technically termed a deed; and the doctrine with respect to the efficacy of a deed, stands upon its own footing; none being bound by it, but the persons who actually execute it. In commercial matters, however, the act of one partner is the act of both;(*a*)

*390] *and therefore, it is necessary to consider, whether the petition of a creditor to obtain a commission, is most like a deed, or a commercial act. It appears to me, indeed, to bear a strong resemblance to an action at law; and as one partner may institute a suit, and the oath of one will be sufficient to establish the debt, on a question of bail, I cannot conceive any satisfactory reason, why more should be required for the purposes of the bankrupt law; and therefore, in my opinion, this objection ought not to weigh with the jury.

3. The third objection argues, that the partnership that subsisted between the defendants, had been virtually dissolved by the general assignment of their property; and that, therefore, a joint commission could not issue against them. I have not had time to examine the authorities upon this point, but, I believe, the doctrine to be well founded, that there must be a subsisting partnership, at the time a joint commission is taken out, and is seems also reasonable, to infer the dissolution of a partnership from an act, by which all its objects are alienated and transferred. The barely executing an assignment, however, of the stock in trade, if the joint transactions are not at an end, will not be an actual dissolution of the partnership; for where there is no express agreement to make that dissolution, the assignment can only be considered as circumstantial evidence of it, which the defendant is at liberty to repel by contrary proof.

(*a*) See Tillier *v.* Whitehead, *ante*, p. 269, and the cases cited in the note to that case

Whether, therefore, the trading subsequent to the general assignment was fictitious, and merely for the purposes of a bankruptcy, as the plaintiff contends; or, whether it was a continuance of the former copartnership, as the defendants allege, must depend upon the facts, on which it is the province of the jury to decide. If they should think that the old partnership was dissolved, and no new one contracted, then, there was not any legal origin for the joint commission—to found a commission upon a fictitious partnership being certainly unfair. But if, on the other hand, there was really a partnership between the defendants, at the time of their bankruptcy, neither the previous assignment of their effects, nor the smallness of the quantity of goods in their store (a matter only to be considered as circumstantial evidence of a fictitious trading), can have any effect upon the case to invalidate the commission, or to defeat the certificate.

4. The fourth objection is, that two of the defendants, Goodwin and Smith, have not committed acts of bankruptcy; and therefore, it is argued, that the verdict of the jury must, at least, be against them. As these persons resided in New Jersey, it is said, in support of this objection, that Meng's store, or the ferry-house (at both which they were denied, and at the last place, they concealed themselves from the sheriff's officer), cannot be deemed their home, so as to satisfy the words of the act, in describing an act of bankruptcy, by "beginning to keep house;" of which the usual proof is certainly, a demand and denial. Under the decisions in England *(and our law is subject to the same construction), a person who resides in a foreign country, trades to that kingdom, and afterwards [*391 goes thither, is clearly within the statute. It is true, that, considering the mere phrase, it seems absurd to say, that a man keeps his house, who has, in fact, no house to keep, and yet, there is a case expressly to that point, where a man, having no home of his own, was held to have committed an act of bankruptcy, by keeping house in the dwelling of another.

But the defendants' counsel have controverted this objection, upon the ground of a departure out of the state; which, they say, applies as well to a stranger as an inhabitant; while, in behalf of the plaintiff, it is contended, that, as the only proof of a departure by Goodwin and Smith, is that of going to their own house in New Jersey, this cannot, upon principle or precedent, be construed into an act of bankruptcy. From the evidence, it appears, that a writ had issued against the four defendants, of which all of them had notice; two of them, it is agreed, committed acts of bankruptcy, and the other two, being inquired for, at the store of Meng, and also at the ferry-house, where they had ordered a boat to be ready, for the express purpose of avoiding an arrest, did actually quit the state, upon hearing that the sheriff's officer was in pursuit of them. This conduct, in the common cases of a resident, would, undoubtedly, amount to an act of bankruptcy; for it has often been determined, that, if a man goes from home, but a day, in order to delay or defraud his creditor, it is sufficient to bring him within the statute. Whether, however, the flight of a stranger to his own home in another state, is such a departure as the law intends, the cases have left in great obscurity; for the only principle ascertained by them, is, that the departure must be with a view to delay or defraud; and the act of parliament itself contains no distinction of the nature now contended for. On so doubtful a point,

therefore, the court would rather, at this time, leave the decision at large to the jury, than venture a positive opinion.

Such then are the objections on which the plaintiff insists that his action is maintainable; and if, upon the whole, the jury think he has proved (as it is incumbent upon him to do) that the certificate has been *unfairly* obtained; either because the commission ought not to have issued, or that the certificate ought not to have been granted, their verdict must be in his favor. But if, on the contrary, there has been no illegal or unfair methods pursued by the defendants to obtain their certificate, they are discharged from the plaintiff's demand, and the verdict must be for them.

After staying out some time, the jury returned to the bar, and declared that they could not agree in a verdict; whereupon, they were dismissed by consent of the parties, and a *venire facias de novo* awarded.(*a*)

---

*392] *FARREL *v.* MCCLEA.

Master of vessel.

The master of a vessel is liable for the payment of the wages of the mate, although the latter may have been shipped by the owners, if he has served on board, with the consent of the master.

THIS was an action brought by the plaintiff to recover his wages, as mate of a vessel, of which the defendant was master, and one Sadlier was owner. On the trial, it appeared, that the defendant, having cited the plaintiff to show his cause of action, acknowledged before the judge, at his chambers, that he was master of the vessel, during the time for which the wages were claimed; but then he insisted, that he had never engaged the plaintiff, who, as he said, was shipped on a contract with the owner. To prove the time of service, the following certificate, subscribed by the defendant was read:

"Philadelphia, 12th January 1787.

"These are to certify to whom it may concern, that Joshua Farrel was mate on board the ———, from the 16th June to the 16th August 1786, making two months. Given under my hand. ROBERT MCCLEA.

"N. B. At the wages of twenty dollars per month, as per Mr. Sadlier's agreement."

Levy, for the defendant, insisted, that the case depending entirely on the confession of the party, the whole of it must be taken together. *Newman* v. *Bradley* (*ante*, p. 240), that then it would appear, as well from the certificate, as from the acknowledgment before the judge, that the plaintiff had been employed by the owner of the vessel, and not by the master; and, consequently, that the owner, and not the master, was liable for the wages. He

---

(*a*) I have been informed by Mr. Ingersoll, one of the plaintiff's counsel, that his client, acting on this occasion upon motives of public spirit, was satisfied with having obtained the opinion of the court in favor of the right to investigate the proceedings before the commissioners of bankrupts, &c., upon a trial at law; and that, therefore, probably, this action would never be prosecuted further.

The counsel were *Ingersoll* and *Rawle*, for the plaintiff; *Lewis*, *Wilcocks* and *Fisher* for the defendant.

admitted, that where a master shipped a sailor, or ordered repairs, he was responsible; but he contended, that there must be a shipment by the master to charge him, on the general principle (Doug. 99, 100); and that where the master or the owner, undertakes by an *assumpsit*, either express or implied, the other is discharged. 2 Str. 816. He endeavored also to establish a distinction between a mate and the common mariners, the mate being, he observed, a middle character between the seaman and the master; and thence, he argued, that, like the master, he was not entitled to the advantages which the maritime law provides for the seamen. 12 Mod. 440.

Moylan, for the plaintiff, stated, that mariners had a three-fold security for their wages: 1st. They may proceed against the owners; 2d. They may libel the vessel; or 3d. They may sue the master. He said, that the master was not bound to receive any sailors shipped by the owners; because he was not only liable to the owners, but to strangers, for any wrong that they might do, when shipped; but he contended, that if the master did receive them, he made himself liable for their wages (12 Mod. 434); and he answered the authorities cited for the defendant, by showing that they were cases of repairs, where workmen were employed by the owners, and could not be rejected or dismissed by the master; nor was he answerable for their conduct. That the contract was, in fact, made by the owner, he observed, rested entirely on the testimony of the defendant; and he urged the necessity of great *caution in admitting the allegations of a man in his own favor. Doug. 751, 753. Receiving them, however, in their fullest extent, on this occasion, they only proved that the owner had assisted in procuring the mate to embark, and this could never defeat the triple right with which the law had armed him. [*393

Shippen, President, in delivering the charge of the court, adverted to the nature of the evidence on which the case was established, and instructed the jury to take the whole together, unless they should think, that there were circumstances in the defendant's confession, which rendered the part in his own favor inconsistent or improbable.

But, even admitting the fact, that the plaintiff had been shipped by the owner, his Honor stated, that the master was liable; for the law gave the plaintiff a three-fold remedy to recover his wages; and unless by some positive act or word, he had released (as he might do) one of those remedies, a mere compliance with the solicitation of the owner to embark, cannot defeat them. He said, there was no distinction, in this respect, between the mate and a common mariner; they were alike subject to the orders of the master, who could equally refuse to receive either; or, when received, was equally empowered to dismiss them; for his appointment as master gave him the sole, undoubted and exclusive right of choosing every seaman under him, whatever courtesy he might be inclined to show to the recommendation of those by whom he was himself employed.

With regard to the case of repairs, the president observed, that it was not strictly analogous to that of seamen's wages, but stood on this footing: If a vessel is in port, where the owners reside, and they, without the interposition of the master, employ carpenters, &c., to repair her, the master is not liable; not merely because he does not employ them, but, because he is not answerable for their conduct, when employed. But if a vessel is repaired

in a foreign port, then, indeed, a similitude arises between the cases, and the master is as liable for those repairs, as for the wages of his sailors, because the workmen, as well as the sailors, are, in the latter instance, employed by him, and equally subject to his control and dismission.

The opinion of the court was, conclusively, that, if the mate had served on board the vessel, the master's having admitted him to do so, rendered him liable for the payment of the wages.

And the jury, accordingly, found a verdict for the plaintiff.(*a*)

Camp *v.* Lockwood.

Confiscation.

Where the estate, real and personal, of an inhabitant of Connecticut, had been confiscated, by virtue of a law of that state, on account of his adhering to the enemy, and a suit was brought by him, in Pennsylvania, after the peace, to recover a debt due by a citizen of Connecticut, residing in this state, at the time of the suit, it was *held*, that the action was not maintainable in the courts of this state.

The plaintiff and defendant had both been inhabitants of Connecticut, previous to the revolution, when the debt for which this action is brought,
*394] was alleged to be contracted, and continued *so, for some time after the commencement of the war. Subsequent, however, to the declaration of independence, the plaintiff joined the British army, and on the return of peace, he removed, with other loyalists, to Halifax, where he continues to reside. On the second Thursday of May, in the year 1778, the legislature of Connecticut enacted a law, declaring that all the estate, real and personal, of any person or persons who had joined the enemies of the United States, or had assisted them, or should thereafter do so, should be confiscated; and that, with respect to those persons who had been inhabitants of the state (the last section of the act providing for the case of persons who had never been inhabitants), the county court, upon application, was empowered and directed to give judgment, that all their estate should be forfeited to the commonwealth, and thereupon, to appoint administrators (as in the case of intestates), who were to sell such confiscated estate, institute suits, recover and pay debts, and to deliver the surplus, if any, into the treasury of the state, &c. In September 1779, the plaintiff was proceeded against, under this law, as one who had been lately a resident of the town of New Haven; and it being duly adjudged that he was guilty of joining the enemies of the United States, his estate was declared to be forfeited for the use of the state of Connecticut, and certain parts of it were seized and sold; but no steps were taken to recover from the defendant the debt said to be due from him to the plaintiff, although the defendant, at the time of the confiscation, and for some time afterwards, remained an inhabitant of Connecticut, and had always had property there, liable to legal process.

Under these circumstances, Camp instituted this suit; in bar of which,

---

(*a*) See Atkyns *v.* Burrowes, 1 Peters Adm. 244; Smith *v.* Leard, Hopkinson's Adm. Cases, 199.[1]

[1] And see Bayley *v.* Grant, 1 Salk. 33; s. c. 12 Mod. 440; Hook *v.* Moreton, 1 Ld. Raym. 397; Brando *v.* Haven, Gilp. 592.

Lockwood pleaded, that the confiscation, by virtue of the act of Connecticut, had divested the plaintiff's property in the debt, if any was due, and vested the same in that state: and to the efficacy of this plea, the present argument was confined, upon a demurrer and joinder in demurrer.

The point was first opened, on the 16th of August 1788, and finally argued, by *Ingersoll*, for the defendant, and *Rawle*, for the plaintiff, on the 21st of November following.

Ingersoll.—The forfeiture of an enemy's estate, movable or immovable, and of his rights, corporeal or incorporeal, is a matter of strict sovereignty, although by the courtesy of nations, debts are allowed to revive at the conclusion of a war. Lee on Capt. 111. The plaintiff, however, comes not within the rule respecting an enemy, but having been proceeded against as a delinquent subject, he must be considered as an attainted traitor; and by such attainder, all his estate, real and personal, were absolutely and irrecoverably forfeited. 3 Bac. Abr. 755. And a forfeiture of real and personal estate extends to things in action as well as in possession (2 Bac. Abr. 577); in which general point of view, the law of Pennsylvania has also expressly regarded the subject. (2 State Laws 99.[1]) The act of Connecticut is as clear and comprehensive as words can make it, considering the party as actually dead, and appointing administrations of his *estate. Nor can the provisions contained in the treaty of peace affect the question; for the treaty does not operate like a reversal of an outlawry, but like a pardon. 22 Vin., tit. Outlawry. [*395

Rawle contended, that, whether the question was considered—1st, upon pleadings here; or 2d, upon a supposition that the suit had been instituted in Connecticut, the plaintiff was not barred of his recovery.

1. Arguing the case on the pleadings here, he premised, that it was a general principle, that nations, with respect to each other, must be considered as individuals in a state of nature. Puff. lib. 2, c. 3, § 23; 1 Vatt. 4, 5; Burlam. 195. Moral entities, or persons, are given to them, in order to render them subjects of actions; but as to what relates to a nation itself, or the property which it has acquired, there is no power that can direct or restrain its conduct. In a state of society, private property yields to the general good; but this is not the case in a state of nature; and therefore, it may be taken as an axiom, that where the act of a particular nation vests in itself the property of an individual, whether a subject or not, the right, thus acquired, extends no further than the jurisdiction of that nation, and the act upon which it is founded can have no extra-territorial force. 1 Vatt. 145. This principle, has, indeed, been recognised by the practice of the United States. For there is no instance of the agents for forfeited estates passing from one state into another; but on the contrary, acts of attainder have always been passed against the same person in the several states where his property was found; which would not, surely, have been necessary, if, either on general law, or under the articles of confederation, the act of one state, appropriating private property to its own use, had any effect beyond the limits of its own jurisdiction. If, then, the state which has passed the law of confiscation, has forborne to reduce the defendant's debt into pos-

[1] Act 6th March 1778, P. L. 102.

session, and the state where the debtor resides has no power to do so, it necessarily follows, that the debt, remaining on its original footing, is liable to the plaintiff's demand. When, indeed, the act of Connecticut was passed, the defendant resided in that state; but when this suit was instituted, he had removed hither; and the law is clear, that the debt follows the person, in every instance, except that of a distribution, in the case of intestacy. Carth. 373.

2. Considering the point, in the second place, upon a supposition that the action had been brought in Connecticut, the question arises, whether a right, not reduced into possession, within due time, can afterwards be recovered? If the administrators had recovered from the defendant, it would certainly have been sufficient to bar the plaintiff's claim; but when the state allowed the debtor to remove from its jurisdiction, an implied power was given to the creditor to pursue him elsewhere. Should a husband neglect, during his lifetime, to recover *choses in action* belonging to his wife, she is entitled to them afterwards, and not his executors or administrators; for the law will
*396] never favor negligence. The reasoning in this *case will apply as well with respect to nations as individuals. Lee on Capt. 119. Besides, a right vested for a particular purpose, ceases with that purpose: the war being at an end, the object of confiscating the plaintiff's debts, &c., is also extinguished; and if the administrators could not recover the debt in Connecticut, nor *à fortiori*, in Pennsylvania, by the rules of natural justice, Camp may recover it; for there can be no plausible reason why Lockwood should be exonerated. Under the treaty of peace, indeed, and the law of Connecticut (passed the 2d Thursday of May 1787), repealing all acts repugnant to the treaty, the administrators could not now interfere to prevent the plaintiff's recovery; for the act by virtue of which they were appointed, is certainly of that description; so that, by the 4th article, Lockwood is estopped from saying that he will pay the debt to the administrators; and by the 6th article, they are precluded from compelling him to do so. This exposition has also prevailed in England; for the agents on the claims of the loyalists make no allowance for outstanding debts; because, as it has been already observed, they may be recovered under the treaty.

Rawle then proceeded to consider, particularly, the objections offered by the defendant's counsel, in support of his plea; which were, he stated, 1st, That the plaintiff was not an enemy, but a rebellious subject; 2d, That by the act of Connecticut, and the proceedings under it, he was attainted, and considered as actually dead; and 3d, That he was not entitled to any benefit under the treaty of peace.

1. To the first objection, he answered, that the proceedings were expressly against Camp as an enemy: that it was by reason of his adherence to the enemies of the United States, and of actions, not merely criminal as they relate to his duty to the state, but to a foreign nation at war with the state, that the forfeiture had been effected; and that the law of Connecticut neither knew nor indicated a distinction between the inimical character of a subject and a foreigner. But he urged, that, as against a delinquent citizen, merely in relation to the state of which he was a member, not an enemy in the strict sense of the word, the act of the state, *non valet extra territorium;* that, therefore, it could never be any bar to Camp's recovery in Pennsylvania; and that, even in Connecticut, he would now be entitled by the treaty

of peace, and the law passed there in support of it, to recover all the property not actually vested and in possession of the state. If, on the other hand, he was proceeded against as an offending subject, in relation to his adherence to a foreign power, the general principles entitle him to recover, after the war has ceased. But in either point of view, the allowance of the present plea would contravene the established principles in the cases enumerated by Vattel, 1 vol. p. 4, §§ 13, 14 ; p. 121, §§ 2, 3 ; p. 129, § 25.

Besides, his offenses as a subject, though committed against a nation confederate and allied with ours, do not allow us to *join in the infliction [*397 of punishment. 1 Vatt. 98, § 232. We cannot, therefore, make ourselves parties to the public severities of Connecticut, nor interfere in the relation and conflict between that state and its subjects: and as no public proceedings have taken place against the plaintiff here, there is not any authority for denominating him an offender against Pennsylvania. The only instance in which these general principles have sustained an alteration, by the articles of confederation, is confined to the *persons* of offenders ; and *expressio unius est exclusio alterius.*

But the admission of this plea would be attended with consequences so inconvenient, that the mere argument *ab inconvenienti* ought to prevent it. In whatever shape it is claimed, it would interfere with the axiom, that one nation cannot intermeddle with the government of another. Vatt. p. 138, § 54. If the plaintiff was attainted, or in debt, here, his property could not be forfeited or attached, since, by the adverse argument, it belongs to Connecticut. Nay, if he came hither with a view to settle, he could not act, trade, nor become a useful citizen, on the funds he found here. Thus a *collisio legum* would arise ; the universal rule of which, is, that the laws and the interest of the state having jurisdiction of the cause, shall be preferred. 2 Hub. 26, axiom 3.

2. To the second objection, he answered, that it was not founded in the truth of the case. Names ought not to mislead us ; for although his property in Connecticut had been confiscated, and an administrator appointed to collect it, yet nothing appears to prove that the plaintiff is not still alive to every legal purpose there, as well as here; independently too of the treaty of peace.

3. But, in answer to the third objection, he insisted, that the treaty of peace removes not only the personal disability, if any such there was, but also the particular bar. Whether, indeed, it operates as a general reversal, or a general pardon, may be questionable ; although the former is the more probable conjecture, since the provision made in favor of recovering property sold as confiscated, would have been needless, if it was only considered in the light of a pardon. But admitting it to be only a pardon, and that it has no effect against *bonâ fide* purchasers, he contended, that it was conclusive in favor of the plaintiff, on the point of restitution, as against the state; and *à fortiori*, in a case where his credits had not been reduced into possession. The fair construction of the treaty necessarily warrants this doctrine.

Ingersoll, in reply.—There are a variety of instances in which this question will be agitated, if the plaintiff should now prevail ; and the purses of individuals, as well as the coffers of the state, will be deeply affected by the decision. It must be remarked, that neither the defendant, nor Connecticut, ask the interposition of this court, but the person who was the object of the

law of that state; that the defendant does not intercept the money in its course to the public treasury; but prevents its being remitted to Nova Scotia; and that the contest, in fact, lies between an individual and a sister state.

*398] *He observed, that he did not controvert the general doctrine advanced by the opposite counsel, that the law of nations is the law of nature, applied to nations, and that one sovereign power cannot be bound by another; but he distinguished between the necessary, and the voluntary law of nations, which arises *ex comitate* (Vatt. prel. 12; Ibid. p. 6); and insisted, that the laws of a nation, actually enforced, are everywhere obligatory, unless they interfere with the independency of another legislature (2 Hub. 26); for common convenience renders it necessary to give a certain degree of force to the statutes of foreign nations. 2 Ld. Kaim. Prin. Eq. 350, 360.

If nations unconnected by any tie, thus indirectly give effect to the laws of each other, the principle upon which it is done, must with greater strength prevail in the case of a political union like that of the American states. It is true, that these states are said to be sovereign and independent; but they are evidently bound by a link which must be taken into view, or we shall argue wrong in the abstract. Thus, it is declared by the articles of confederation, that a citizen of one state, is a citizen of every state; and the congress are not, as Mr. Adams (*a*) has termed them, an assemblage of ambassadors; but a sovereign power, and capable of suing like a corporation, without any express statute to enable them. See *ante*, p. 41 (*Respublica* v. *Sweers*).

But the operation and effect of a sentence or judgment of a foreign court, cannot surely be more binding than the act of a foreign legislature; and these, *ex comitate et jure gentium*, are in many cases final. 1 W. Black. 258, 262; Vatt. lib. 2, c. 7, § 84, p. 147. If a debtor be discharged where the debt was contracted, he is equally so in every other place; so that if Lockwood had been discharged by the state of Connecticut, this suit would not be maintainable against him even in the King's Bench of England. Co. B. L. 347. The court of chancery held itself bound by the decision of a competent foreign jurisdiction, declaring an acceptance to be void (2 Str. 733); and because a debt had been discharged according to the *lex loci*, though in the depreciated paper money of North Carolina, Lord Thurlow, since the revolution, has refused a *ne exeat regno*. (Bro. 376.) A similar principle has governed the supreme court, in the case of *Millar* v. *Hall* (*ante*, p. 229), and this court, in the cases of *Thompson* v. *Young* (*ante*, p. 294), and *Le Clerc* v. *Richette*.

A distinction is likewise to be observed between a foreign sentence *authorising*, and a foreign sentence *dismissing*, a claim; for if the proper tribunal dismisses a claim, the sentence is definitive (2 Ld. Kaim. Prin. Eq. 375); and in that description, the proceedings, so far as they affect Lockwood, must be included. The case in Carth. 373, is certainly right, as a general rule; but it is liable to several exceptions; for, 1st, The law of one country may indirectly have effect in another, by the voluntary law of nations; 2d, If a right of action has been legally transferred in one jurisdiction, the rule by which it is to operate, is the same in every other jurisdiction; and

(*a*) See Mr. Adams' "Defence of the American Constitutions."

3d, Where a debtor has been dismissed *by the proper tribunal, it is a protection everywhere else: and these exceptions take place, in considering the question as between nations totally independent and unconnected. It is true, that the American states have hitherto been held by a very slight confederacy; but what remedy is to be pursued? Shall we, if the knot is loose, make it still looser? If the union is weak, shall we increase the debility? Or, when a more perfect consolidation is essential to the national existence, shall we employ repulsion instead of attraction, and thus widen the inconvenient and ruinous distance between the different members of our political body? Neither reason nor experience would justify such a construction; and the United States though individually sovereign and independent, must admit, not only the voluntary law of nations, but a peculiar law resulting from their relative situation.

No cases can be more distinguishable than the present, and that in which the rule for reviving rights and credits, at the expiration of a war, occurs. There is no doubt, that on the declaration of peace, a British subject could sue here; and we find, that although our government conceived that they might act as they thought proper with respect to the citizens of the state, yet the instalment laws were never extended to obstruct and protract the recovery of debts due to foreigners. If, therefore, Camp is to be considered in the honorable light of an open enemy, the argument for the defendant is unfounded; but when it is recollected, that he did not avow his sentiments on the declaration of independence; and that, nevertheless, he remained in the enjoyment of his property, under the laws of Connecticut, for some time afterwards, it is impossible to regard him in any other light than that of a subject, and subjects are the objects of the municipal law, not of the law of nations. In the case of *Respublica* v. *Chapman*, on an indictment for treason (*ante*, p. 53), the defendant was acquitted, because, in the opinion of the court, he was not a subject: if he had been a subject, he must have been attainted; and being so attainted, he could never have claimed any advantage from the law of nations, on the return of peace.

Thus, with respect to Camp, he was a traitor; the proceedings under the act of Connecticut, produced a forfeiture and attainder; and the right of action was as exclusively vested in the state (and by the power of that state alone can it be divested), as if he had been taken and executed. The act, indeed, does not speak at all of an enemy, but of such persons as were resident in Connecticut, and had joined the British troops; for proceedings of this kind are never carried on against an open enemy. The profits of his property may be sequestered, during the war, in order to prevent their being remitted, but no forfeiture can take place.

If, then, Camp was a subject of Connecticut, he derives no right from the treaty of peace; for Great Britain could not mean to interfere between that state and her own citizens. The description of the fourth article cannot be extended to him; and though *the sixth article certainly designates persons acting as he has done, yet it gives no further advantage than to [*400
protect his person from molestation, and to preclude any future confiscations of his property. The confiscation of the present debt, &c., was in the year 1779, and no further proceedings are requisite to retain the right which the state thereby acquired. The Marquis of Carmarthen's complaint of laws passed against the treaty, did not include laws of this description; for

although he must have known that similar ones existed in Pennsylvania, he admits, that here there are no acts passed against the treaty. Purchasers under the state are considered by the treaty as holding a good title; but it provides for persons entering into a negotiation for the reconveyance of their forfeited estates from such purchasers.

In the case of *Respublica* v. *Gordon* (*ante*, p. 233), the confiscation was complete before the treaty: and therefore, though it would have been incompatible with it, to have sustained any legal proceedings afterwards, in the supreme court, against the defendant, an act of the legislature became necessary to divest the right which the state had acquired by the previous confiscation.

The conduct of the British agents can furnish no authority to us; but the reason for their refusing to make an allowance for debts, was the difficulty of ascertaining them, and not the presumption of their being recoverable after the peace. Nor does the act of Connecticut, repealing all laws against the treaty, affect the law in question, which is directed to an object of mere municipal regulation. The state had a right to do as they pleased with all the confiscated property; and on any, or no consideration, to release all his debtors. Whether, indeed, they had recovered the whole, or a part, or whether they have compounded, or dismissed the debt, it could not inure to the benefit of Camp. He cannot now be punished for past depredations; but the property vested in the state of Connecticut, cannot be revested, without her authority.

If the treaty is to be considered as a reversal of an outlawry, then, a restitution would ensue; but if it is taken in the light of a pardon, that does not divest anything previously vested in a subject, nor even in the king who grants it, unless by express words. 3 Bac. Abr. 810; 2 Vin. 401, pl. 4, p. 404.[1] The right of action in the present case was clearly transferred to Connecticut, and neither expressly, nor by implication, has she waived it.

After considering the case and arguments, the president delivered the opinion of the court in these words:

SHIPPEN, President.—The question in this case is of importance, both on account of the principles to be established by the decision, and the many cases which may possibly be affected by it. It has been learnedly and ingeniously argued on both sides; but, though large ground has been taken, I think, the whole may be reduced to a very moderate compass.

*401] *This is not a suit brought by the state of Connecticut, or any person claiming property under their local laws, wherein a question can arise, whether effects forfeited by the laws of that state can be recovered here, by the administrators of the person whose estate is confiscated. It is simply, whether the debt has been forfeited there, and actually vested in that state; and whether anything has occurred which divests it; and whether, under the peculiar circumstances of our relative situation with regard to each other, the courts of this state can take notice of such confiscation and vesting, so as to preclude the plaintiff from recovering *here*, a debt due to him *there*, before that confiscation.

---

[1] Aldrich *v.* Jessup, 3 Grant 158: and see Dietrick *v.* Mateer, 10 S. & R. 151; Ash *v.* Ashton, 3 W. & S. 510; McGregor *v.* Comstock, 16 Barb. 427.

In order to pave the way for a decision of these questions, and to distinguish between the situation of this country, and those treated of by the learned writers on the laws of nature and nations, and the rights of distinct independent sovereignties, quoted by the counsel, it will be necessary to point out that peculiar, relative situation, which these states stand in with regard to each other.

When a resistance was made to the execution of the laws of Great Britain, and an actual war took place between us and them, we were not thirteen independent states, but colonies and provinces, belonging to, and a part of, a great empire, comprehending both countries. The resistance was made in consequence of common grievances suffered by all the provinces, from the head of that empire; and it was a struggle to untie the knot that bound us together, and to emancipate us from the dominion of our then mother country. In the prosecution of this plan, all were equally principals, and carried on the war as a common cause, and by common consent, without being tied together by any regularly organized system of government. The first body that exercised anything like a sovereign authority, was the congress of the then united colonies, who superintended the whole, and by the like common consent, were invested with such general powers as were necessary for the prosecution of the war. We afterwards divided ourselves into several distinct governments, by the name of states; still leaving the general power in congress, which, being in a great measure undefined, was exercised, with regard to internal matters, by recommendations to the several governments, instead of laws; which, however, had generally the force of laws.

The articles of confederation were not acceded to by all the states, for some years. By these articles, each state was to retain its sovereignty, freedom and independence, and every right not expressly delegated to congress; but the free inhabitants of each state were to be entitled to all the privileges and immunities of free citizens in the several states. Before the articles of confederation were agreed to, congress had recommended to the several states to confiscate, as soon as might be, and to make sale of all the real and personal estates therein, of their inhabitants, and other persons, who had forfeited the same, and the right to the protection of their respective states.

*In consequence of this recommendation, the state of Connecticut, in the month of May 1778, passed an act to confiscate the estates of persons inimical to the independence and liberties of the United States, within that state. By this law, all estates, real and personal, within the state, which belonged to any person or persons who had gone over and joined with the enemies of the United States, or had aided or assisted them, or should thereafter do so, were declared to be confiscated. The mode of proceeding against those who had been inhabitants, was directed to be by application to the county court, who are empowered to give judgment and sentence, that all the estate of such persons should be forfeited for the use of the state. The court is then directed to grant administration of the estates, as in case of intestates' estates. The administrators were to sell such estates, institute suits, recover and pay debts, and deliver over the surplus, if any, into the treasury of the state. The last clause in the act directs the mode of proceeding as to the estates of persons who never had an abode within the state. [*402

In pursuance of this act, Abiathar Camp (who is stated to have been lately a resident of the town of New Haven), in the month of September 1779, was charged, on the information of the selectmen, before the county court, with having joined the enemies of the United States, and put himself under the protection of the king of Great Britain: he was thereupon adjudged guilty, and sentence passed, that all his estate, real and personal, should be forfeited to the use of the state. Certain parts of Camp's estate were, in consequence of this forfeiture, seized and sold; but no proceeding was had to recover against James Lockwood, the present defendant, the debt said to be due from him to the plaintiff, although the defendant was at that time, and for some time afterwards, an inhabitant of Connecticut and amenable for the same.

And here the question arises, whether the plaintiff himself can now recover it: It is contended, on the part of the plaintiff, that the proceeding against him was as an *enemy*, and not as a *traitor*, and that, therefore, the war being over, his right revives. The sentence against him was certainly not expressly for treason, and there is no judgment against him that, in terms, subjects his person to punishment as a traitor. The act of assembly directs the proceeding to be had only against the estates of such persons as had joined the enemy, but it distinguishes between such as had been inhabitants of that state, and those who never had an abode within it, but had estates there. The present plaintiff was convicted as an offender of the former description, being late a resident in the town of New Haven, and is plainly pointed out as a subject. Indeed, the fact is conceded, that he really was a citizen of the state, who joined the enemy long after the declaration of independence and the organization of our state governments. He cannot, therefore, be considered in the light of such a public enemy whose rights are said, by the writers on the law of nations, to revive after the termination of *the war; the municipal law of the country operated upon him as a subject, and he could not be an object of the law of nations.

*403]

The objection to the courts of this state, as a sovereign independent state, interposing to prevent the recovery of a debt, on account of the confiscation of it, in another independent state, is, in a great measure, obviated by the statement which I have before made of the peculiar relation that these states stand in to one another. Though free and independent states, they appear not to be such distinct sovereignties as have no relation to each other but by general treaties and alliances, but are bound together by common interests, and are jointly represented and directed, as to national purposes, by one body as the head of the whole. The offence which incurred the forfeiture, was not an offence against the state of Connecticut alone, but against all the states in the Union; and the act which directed the forfeiture, was made in consequence of the recommendation of congress, composed of the representatives of all the states, and was a case within the general powers vested in them, as conductors of a war in which we were all equally principals. Our courts must, therefore, necessarily take notice of the confiscations made in a sister state, on these grounds.(*a*)

It remains, then, only to consider, whether this debt was vested in the

(*a*) See Marks *v.* Johnson, Kirby's Reports, p. 230.

state of Connecticut, and, if it was, whether it is revested in the plaintiff, by the treaty of peace?

All his estate, both real and personal, in that state was confiscated. All things come within the description of confiscable personal estate, which a man has in his own right, whether they be in action or possession; this debt was due from a person then residing within the state of Connecticut, and was, consequently, confiscated, as other debts due there, and the right of action, as well as the debt, was vested in the state.

The 4th article of the treaty of peace, which directs that creditors, on either side, shall meet with no lawful impediment to the recovery of all *bona fide* debts theretofore contracted, is most certainly confined to real British subjects, on the one side, and the citizens of America, on the other; and it has been always so construed. As to the restitution of estates, rights and properties, already confiscated, it is not required by the treaty to be done, even as to real British subjects. It is agreed, indeed, by the 5th article, that congress shall recommend it to the several legislatures to provide for such a restitution; and to those of another description, they have liberty given them by the treaty, to reside twelve months in the United States to solicit a restitution and composition with the purchasers of their estates, and congress is to recommend to the states, that they be restored, on refunding the money paid for them. *But no acts for those purposes have been [*404 passed by the legislature, in consequence of any such recommendations. Indeed, the ample provision made for these people in England, seems to have been considered by the government there, as an act of justice, for not having been able to obtain a restitution by the treaty.

For these reasons, we are of opinion, that Abiathar Camp is not such a person as has a right to sue for and recover this debt, already vested by confiscation in the state of Connecticut.

SUPREME COURT OF PENNSYLVANIA.

JANUARY TERM, 1789.

PINCHIN *v.* FRY.

Justice of the Peace.

ON the return of a *certiorari* to one of the justices of Philadelphia county, it appeared, that the defendant had been summoned to answer to-morrow, that is, on the day succeeding the date of the summons, for a debt under forty shillings; that the matter in dispute was then referred to three men, who reported the sum of 2*l.* 2*s.* 4*d.* due to the plaintiff; and that for the amount of this report, the justice had entered judgment with costs.

Levy moved to reverse the judgment: 1st, Because the summons was returnable on the next day, whereas, the act of assembly requires that there should be allowed a time not less than five, nor exceeding eight days. (1 State Laws 204; Act of 1745.) And 2d, Because the summons was to answer a debt under forty shillings, and the judgment was for a greater sum.

BY THE COURT.—Let the judgment be reversed.(*a*)

HALHEAD *v.* ROSS *et al.*

Practice.—Rule for trial or non-pros.

MOYLAN had entered a rule for trial at the last term or *non-pros.* The rule being continued until this term, a plea was added, and particular facts referred; and upon these, a report had been made, a few days before the day appointed for the trial of the cause.

Lewis, for the plaintiff, now objected to the trial's coming on; and *Moylan* insisted that he was entitled to a *non-pros.* But by—

(*a*) See Gibbs *v.* Alberti, 4 Yeates 378; Anon., Addis. 272.

Johnson v. Hocker.

*McKean, Chief Justice.—The subsequent plea and reference virtually vacate the previous rule for trial or *non-pros.* The cause must, therefore, be continued, under a new rule.

Calvert *v.* Pitt.

Justice of the Peace.—Practice.

This was a *certiorari* to one of the justices of Chester county. On arguing the case, the judgment of the justice was affirmed.

And, by McKean, Chief Justice, it was stated, that conformable to the act of assembly, the defendant, after judgment was given against him by a justice, ought to enter into a recognisance *instanter*, with, at least, one good surety.(*b*) He may afterwards withdraw his security, or appeal to the common pleas, within the six days allowed by the act.

Johnson *v.* Hocker.

Evidence.—Tender.

A certificate by a public officer, made evidence by an act of assembly, is admissible, though the officer certifies, in addition, to extraneous matter, not evidence.
Construction and effect of the *tender* laws of this state of 1777, 1778 and 1781.

This was an action of debt, brought upon a bond, bearing date the 24th of April 1769, and conditioned for the payment of 500*l.* lawful money of Pennsylvania. To the plaintiff's demand, the defendant pleaded *payment*, and issue was thereupon joined.

On the trial of the cause, *Sergeant*, in order to prove payment to the treasurer, agreeable to the tender law, offered to read the following certificate to the jury:

"Received, 29th March 1780, of Mr. George Hocker, the sum of 373*l.* 6*s.* 6*d.*, being two-thirds of a bond and interest due to Mr. J. Johnson, of Germantown, which he refused to receive, when legally tendered to him in presence of Balzer Hidricks and Conrad Reedheiffer; the other one-third he left in my hands, to be given to such poor and distressed persons as I shall think proper objects of charity.

Isaac Snowden, Treasurer."

Lewis, for the plaintiff, objected to the evidence, that this was not a certificate, merely official, but containing certain extra-judicial facts, to which Snowden, like any other witness, ought to be produced and sworn. The consequence of admitting it, would be highly dangerous.

Sergeant answered, that what was surplusage might be rejected, and the paper go to the jury only as proof of the receipt of the money. If a

---

(*a*) See Respublica *v.* Coates, 1 Yeates 35; Smith *v.* Davids, *post*, p. 410; Thurston *v.* Murray, 3 Binn. 413; King of Spain *v.* Oliver, 1 Peters C. C. 217.

(*b*) Contrà, Mann *v.* Alberti, 2 Binn. 195, under the act of 1804.

notary, in England, introduced foreign matter into the protest of a bill of exchange, the court would strike out so much as was surplusage, but would never suppress the whole. Snowdon could easily, on this occasion, be produced; but similar cases may occur, at a distance, in which it would be impracticable, and great inconvenience and injustice would result from the precedent.

*407] *McKean, Chief Justice.—We certainly should not permit Mr. Snowdon, if he were here, to swear that he was told that such persons were present at the tender; but the question is, whether, having certified what he ought not to certify, the whole ought to be rejected? We think, that it ought not. The paper should be admitted, to prove that payment was made to the treasurer, agreeable to the act of assembly, at the time mentioned in the receipt. All the rest may be stricken out; or, indeed, only so much as goes to that point, may be read, and admitted to be proved.

The Chief Justice, accordingly, read to the jury so much of the certificate as related to the receipt, and suppressed the rest.

The material facts, and the law arising in the principal case, were stated in the following charge to the jury.

McKean, Chief Justice.—The evidence that has been produced establishes these facts: That the defendant owed the plaintiff a prior debt of 1700*l.*, which was secured by a mortgage, dated the 23d of April 1768, on a mill and other real estate; that on this mortgage several payments were made, at several times; but the interest running eventually greatly in arrears, the defendant was advised to sell the mortgaged premises, which he did, and Weiss (one of the witnesses who has been examined) became the purchaser, for 1750*l.*, which, it was agreed by the parties, should be paid to Johnson, on Hocker's account. It appears, that Weiss accordingly made several payments to Johnson; and it has been contended by the defendant's counsel, that calculating these and the previous payments, the plaintiff's demand, including the present bond, has been considerably overpaid. There does seem, indeed, to be a mistake in the sums; but of this the jury must judge; for it is in proof, that on the 24th of April 1777, the defendant became debtor to the plaintiff, and gave the bond in question; so that if any deceit was used upon the occasion, we think, it is incumbent upon him to show it to the satisfaction of the jury.

The court, then, are clearly of opinion, that this bond must be considered as a new contract; but even in that light, the defendant insists, that it was discharged by a tender and refusal on the 29th of March 1780. The tender at that time has been proved; though there is no certainty as to any previous tenders which the defendant has endeavored to establish. And here the great question arises, whether this is to be deemed an absolute discharge, or only to be regarded as a tender at common law?—which necessarily leads to a review of the various acts of assembly upon the subject.

The act passed on the 29th of January 1777 (2 State Laws, 7), declares that a tender shall amount to an actual payment and discharge; which is far more extensive than a tender at common law; that operating only to

suspend the interest, until a subsequent demand and refusal have taken place. If, therefore, the tender, on this occasion, was made in continental money emitted by congress *before the 29th of January 1777, it is cer- [*408
tainly conclusive against the present demand. Conscientious men may, indeed, reflect upon the enormous advantage of making a payment at the rate of sixty for one; but we are bound by the explicit language of the law (except where it violates the constitution of the state), and must leave those to answer for its policy, by whom it was enacted.

But on the other hand, how will the case stand, if the tender was not made in bills of credit of a date antecedent to the 29th of January 1777? The arguments of the counsel have differed widely on this ground; and the question is, whether the words of the act apply only to the bills of credit which congress had emitted; or extend also to those bills which congress might emit?

The doubt, in this respect, is not entirely novel. A British sergeant, having a license, in the year 1778, to carry clothing from Philadelphia to Lancaster, for British prisoners of war, brought with him some forged paper money, and passed it at the latter place. He was tried for this offence, and the distinction was then taken, that the forgery was of an emission subsequent to the 29th of January 1777. The point, however, did not prove to be material; for the court considered the defendant as an alien enemy, who might, indeed, be punishable for any action *malum in se*, but was not liable to the penalties of a municipal regulation; and on that ground, directed the jury to acquit him.

By the act which was passed on the 20th of March 1777 (2 State Laws 48), we find, that the state paper money, then emitted, was only made a tender at common law; for the words of the act merely declare that a tender in that money shall have the same effect as a tender in specie, which is clearly no more than a suspension of the interest. The succeeding act, passed on the 25th of May 1778 (2 State Laws, 31), after providing for the exchange of bills of credit issued under the authority of the king of Great Britain, gives to the bills of credit issued by congress, only the same currency and effect in payment of debts which the above mentioned act of the 20th of March 1777, had given to the bills of credit emitted by the state; and that, as I have already remarked, did not amount to an absolute discharge of the obligation. By the act of the 3d of April 1781 (1 Sm. Laws 519), tenders are declared to have no other force than that which was given to them by the laws in existence at the time they were made. (1 State Laws 447.)

The intention of the legislature must be collected from the words which they have used, unless a different meaning can be manifestly shown. The construction, then, that we have put upon the words of the act of the 20th of March 1777 (which by express reference, is made to govern the operation of the act of the 25th of May 1778), is, that the legislature only intended to make a tender of the 200,000*l.* bills of credit, equivalent to a tender at common law. There is no satisfactory reason opposed to this construction; and but for this, the act of the 29th of January 1777, might be as well extended to the bills of credit which were afterwards, *as to those which were [*409
previously emitted by congress—a matter that we are not bound, nor are we inclined to countenance.

This opinion, unanimously formed, upon mutual consultation, and full deliberation, leads to a more particular consideration of the evidence; and if the jury think that the bills of credit, or any part of them, which were tendered to the plaintiff, on the 29th of March 1780, were emitted subsequent to the 29th of January 1777, they must only give this tender the effect at common law.

It may be proper here to notice, that there were two bills, of thirty dollars each, in the bundle of paper money tendered; and the plaintiff's counsel has said, that there were no bills of that denomination emitted prior to the 29th of January 1777. But he is certainly mistaken; as I remember well the trial of a man for counterfeiting a thirty dollar bill emitted in 1776: and therefore, this circumstance is by no means conclusive.

But should the jury, upon the whole of the evidence, find, that this tender was made in bills of credit emitted since the 29th of January 1777, and so not an absolute discharge of the debt, they will next inquire, in what manner the bond ought now to be paid? By the act of the 3d of April 1781, it is declared, that all debts and contracts entered into between the 1st of January 1777, and the 1st of March 1781, shall be liquidated according to the scale of depreciation. The plaintiff, therefore, is not entitled to recover the whole 500*l.* in specie, but only so much as that sum in paper money was worth, at the time the contract was entered into; which was on the 24th of April 1777; nor is he entitled to any interest from the date of the tender, until this action (which is to be considered as a new demand) was instituted.

The jury found a verdict in favor of the plaintiff for 272*l.* 3*s.* 4*d.* debt, with costs: from which, it seems, that they were of opinion, that the tender was not made entirely in bills of credit emitted before the 29th of January 1777; and that they pursued the directions of the court in that alternative.

Steele *v.* Steele.

Practice in divorce.

This was an issue joined on the facts alleged in a libel for a divorce: and upon the trial, the Chief Justice observed, that notice ought to be given of the facts intended to be proved under the general allegations of the libel.

Rush, Justice.—I think it would be most convenient to give notice, that between two specific dates, acts of cruelty, &c., were intended to be proved.

The Court seemed to adopt that idea, and recommended it for the future practice of the bar.(*a*)

(*a*) See Garrat *v.* Garrat, 4 Yeates 244.

*Smith *v.* Davids.

Rule for trial or non-pros.

A RULE for trial, or *non-pros.* was taken in September term 1787, and notice at bar was entered on the docket. The cause was afterwards continued, generally, until January term 1789, and no notice given.

The cause being now marked for trial, the plaintiff moved to put it off.

But the COURT held, that the rule for trial, or *non-pros.*, was continued; and that no new notice was necessary. If, therefore, the plaintiff does not go on to trial, the defendant is entitled to a *non-pros.*(*a*)

Robbins *v.* Whitman.

Practice on certiorari.

Where a justice's judgment is affirmed, on *certiorari*, execution issues out of the court above, without a *remittitur*.

THIS cause was removed by *certiorari* from one of the justices of the peace for Northumberland county; and after argument, the judgment of the justice was affirmed.

It then became a question, whether execution could issue out of this court upon the judgment so affirmed.

And it was ruled by the COURT, that execution might issue at once, without referring the cause again to the justice; as that would be a circuitous, inconvenient and unreasonable mode of proceeding.

(*a*) s. p. King of Spain *v.* Oliver, Peters C. C. 217; and see Halhead *v.* Ross, *ante*, p. 405.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

MARCH TERM, 1789.

SCHLOSSER *v.* LESHER.

Statute of Limitations.

Writs of *capias* and summons, in Pennsylvania, are similar to the originals of the English practice, and therefore, it is not necessary to enter continuances, to prevent the operation of the statute of limitations.[1]

Where a writ has not actually abated, it is not necessary that the action should be prosecuted within one year after the six years have expired.

THIS was an action of *indebitatus assumpsit* for goods sold and delivered. The defendant pleaded *non assumpsit*, and *non assumpsit infra sex annos:* the issue on the *non assumpsit* was tried, and a verdict found for the plaintiff. To the plea of the statute of limitations, the plaintiff replied, a writ of summons issued on a particular day, within the six years, which was returned *nihil.*

Whether the replication contained matter sufficient to prevent the bar of the statute of limitations, was the question; and after an able discussion by *Ingersoll* and *Sergeant*, for the plaintiff, and *Levy* and *Todd*, for the defendant, the president stated the material circumstances and arguments, and delivered the opinion of the court as follows:

SHIPPEN, President.—Two points have been made in this case by the defendant's counsel: 1st, That it does not appear that the process was issued for the same cause of action, as it is not continued to the time of filing the declaration. And 2d, That if this did appear, the second action should have been brought within a reasonable time after the expiration of the six years; which reasonable time they restrict to one year.

---

[1] McClurg *v.* Fryer, 15 Penn. St. 293; Logan *v.* Green, 1 Pitts. 43. But to save the bar of the statute, an *alias* must be taken out within six years. Curcier's Estate, 28 Penn. St. 261.

As to the first point, it is agreed by the counsel on both sides, and it is undoubtedly the law, that where an original is replied to the plea of the statute of limitations, it is sufficient to show when the writ issued, without any continuances; but where the writ is a *latitat* from the king's bench, or a *clausum fregit*, in the common pleas, the continuances must be set forth, to be entered to the time of filing the bill or declaration, in order to show that it was for the same cause of action. [*412

This gives rise to the question, whether our writs of *capias* and summons resemble more the original writs, or the *latitat* and *clausum fregit?* And in order to solve this question, it will be necessary to consider the reason of the difference between these writs in England.

The *latitat* and *clausum fregit* are both writs of trespass, yet, by the course of the courts of king's bench and common pleas, the plaintiff may ground upon them declarations in any personal actions. But when the declaration is in *assumpsit* (for instance), a writ of trespass, issued within the six years, could not be presumed to be a writ that issued in that cause, unless it was further shown in the replication, that it was taken out with an intention to declare in that action; and as evidence of that intention, that the continuances were entered, from the time of issuing it, to the filing the bill or declaration. But in the case of an original, proper to the action, that is never necessary, because, if the declaration was in *assumpsit*, the original would show, it was issued in case: if the declaration was upon a bond, the original would show it was issued in debt; and consequently, that it was a proper and legal foundation for the action; and the continuances are not necessary to be shown, as a proof that the writ issued for the same cause of action; for, being such a writ as corresponded with the declaration, the law presumes it was for the same cause of action, unless the contrary is shown.

That this is the reason of the distinction between originals and the writs of *latitat* and *clausum fregit*, to this purpose, will appear from this: that whenever the writ which commences the action, is of such a nature as to correspond with the declaration, we find, it will be sufficient to set it forth, without the continuances, although it be not an original: and on the contrary, whenever the writ does not correspond with the declaration it will not support the replication, without the continuances, although it be an original. An instance of the first *kind* is the attachment of privilege in the common pleas, which will be found by the precedents always to specify the nature of the particular action, whether in debt or case, which is afterwards declared upon; and hence, we find, in 1 Wils. 168, the replication showing only the time of issuing the writ, without the continuances, will be sufficient. So, in the reversed case, when a common *clausum fregit* is the writ, although it be an original writ issuing out of chancery, yet, not being adapted to the action of *assumpsit* or debt, being only a foundation for the *capias* in the common pleas, and intended merely to give that court jurisdiction, it will not be presumed to be the foundation of such an action, unless the continuances are set forth, from the time of issuing the writ. Hence, it is evident, that it is from the disagreement *of the writ with the declaration only, that it becomes necessary to enter the continuances, to show it issued for the same cause of action, in order to prevent the bar of the statute of limitations; and after all, the entry of the continuances, in those cases where they are said to be necessary, is little more than matter of mere form, as it appears in 1 Sid. [*413

53, 60, that they may be entered by the attorney, in his chamber, at any time, even after the statute of limitations is pleaded.(*a*)

By our act of assembly, and the practice under it, the writs of *capias* and summons always specify the nature of the action you are to declare upon, and are, therefore, similar, in this respect, to the originals out of chancery, and the attachments of privilege in the common pleas.

The second point made by the defendant's counsel is, that, admitting the plaintiff, by issuing the writ, has saved the bar of the statute, yet, that the action ought to have been prosecuted again, within a reasonable time after the six years expired, and that *that* reasonable time has been held to be one year.

In considering the dates and times of the several transactions, the period during which the act of assembly suspended the act of limitations, that is, between the 1st of January 1776, and the 21st of June 1784, is, to every purpose, to be thrown out of the computation. Then, from the time of the cause of action arising, to the time of issuing the summons, is four years, nine months and ten days; from that time to the prosecuting the suit again, is two years, six months and two days; making, in the whole, seven years, three months and twelve days.

The cases cited in support of the second point, are all cases where, by the death of one of the parties, or from some other cause, the action had abated, and the court, in considering what was a reasonable time to permit the party to bring a new action, have drawn their reasonings from the equity of the statute, which provides only for two cases; one, where the plaintiff had obtained a judgment which was reversed for error, and, the other, where a verdict had passed for the plaintiff, and the judgment was arrested, and judgment given that the plaintiff should take notning by his writ. But other cases arising, which put the plaintiff in the like situation, by an abatement of the action, the judges thought, that they ought to have a reasonable time after the expiration of the six years to renew their actions; some of them say, *that* reasonable time was in the discretion of the court, depended upon the circumstances of the case; and others say, that, within the equity of the statute, *that* reasonable time ought to be one year. But these are all cases where the writ had actually abated, and could, consequently, afford no support to the new action. How are the cases of originals and *latitats*, where nothing had happened to abate the writs? They are considered as subsisting foundations upon which the parties may prosecute their suits; in the one case, by entering the continuances from the time of suing out the writ, and in the other, without any such continuances; in both cases they
*414] are deemed subsisting writs, and the *commencement of the action, for the purpose of taking the case out of the statute of limitations, and the prosecution of the suit afterwards is not considered in the light of a new action, although some process might be necessary to bring the party into court. In Lilly's Prac. Reg. 19, it is said, "the taking out the writ of *latitat* is in nature of filing an original, and by doing it, the suit is commenced, within the meaning of the statute, although he does not declare against the party within the time limited by the statute."

As the cases of subsisting writs and abated actions are thus totally differ-

(*a*) Pennock *v.* Hart, 8 S. & R. 380, per Gibson, J.

ent, I have looked for cases where there may be some limited time for proceeding upon the foundation of the old writ, when there has been no abatement of it; and I have met with but one case in which such a limited time has been suggested. It is in 1 Sid. 53, where TWISDEN, Justice, says, that he had known a suit continued by *latitat* for five years, before the bill filed; and Herne, secondary, said, that a *latitat* may be continued seven years. If this may be considered the limited time, the writ in the present case is long within it; as, excluding the suspended period, the suit was again prosecuted within two years and a half.

If this could have been considered in the light of an abated writ, and a reasonable time, in the discretion of the court, was the rule, we ought certainly to take into our consideration the peculiar situation of our country and the correspondent laws, which restrained creditors from prosecuting their suits with the same advantage as at other times, as they could take out executions only for one-third of their debts in one year; and this certainly deterred many from prosecuting their suits at all, during the continuance of that restraint. On this ground, therefore, the allowance in the present case would be very moderate, as it would not extend three months and a half beyond the time contended for by the defendant's counsel. On both points, we are of opinion, that the law is with the plaintiff.

Judgment for the plaintiff.(*a*)

(*a*) See Harris *v.* Dennis, 1 S. & R. 236.

SUPREME COURT OF PENNSYLVANIA.

APRIL TERM, 1789.

KENNEDY *v.* NEDROW and wife, *et al.*

Dower.

A. bequeathed to his wife B., several parcels of land in fee, and gave to her also several sums of money and stock, and, *inter alia*, devised to her a moiety of a tract of 500 acres; after the death of A., B. brought an action of partition against the devisees of the other moiety of the farm: *Held*, 1st. That the bequests to B. were not in satisfaction of her dower; 2d. That she was not estopped by the proceedings in partition from recovering her dower in the same land.

THIS was an action of dower in 250 acres of land in Lancaster county, brought by Anne Kennedy, widow, who was the wife of Richard Johnson, deceased, against Thomas Nedrow and Anne, his wife, Catharine Wistar, and Rebecca Martin. The tenant pleaded, 1st, a special plea, "that Richard Johnson, the husband, on the 12th of August 1767, made his will, and thereby devised a moiety of 500 acres of land to his wife, the demandant, in fee; which devise was in lieu of dower: and 2dly, they pleaded "That the demandant had sued out a writ of partition against the tenants, for making partition of the said 500 acres of land, and had recovered, &c." To these pleas, the demandant replied, the tenants demurred, the demandant joined in demurrer, and issues.

On the first plea, a case was stated, in substance, as follows: That on the 12th of August 1767, Richard Johnson made his last will and testament, and therein bequeathed and devised *in hæc verba*: "*Imprimis*, I give and bequeath unto my loving wife, Anne Johnson, all that my lot of ground, situate, &c., which I bought of John Millar, &c., with the houses, barns and other appurtenances thereunto belonging; also, all my household goods, horses, live-stock and other movables, which I have here in Lancaster, and in Germantown, Philadelphia county, to her, her heirs and assigns for ever; also, 1000*l.* lawful money of Pennsylvania, in bonds and bills, to be paid to her, or her heirs and assigns, in six months' time, after my decease, with interest, by my executor hereinafter named. I give and bequeath unto
*416] my brother, John Johnson, *and to each of his three sons, and his daughter, &c., the sum of 5*l.*, to be paid three months after my decease, &c. I give and bequeath unto my sister, Anne Nedrow, all that my 800 acre tract of land, situate, &c., with the appurtenances, to her, her heirs and assigns for ever. I give and bequeath unto my sister, Catharine Wistar,

all that my 300 acre tract of land, situate, &c., to her, her heirs and assigns for ever. I give and bequeath unto my loving (wife) Anne Johnson, the one moiety or undivided half of all that my 500 acre tract of land, situate, &c., to her, her heirs and assigns for ever: provided always, that if my said wife, Anne Johnson, after my decease, should be married to another man, that then she shall have the said moiety during her life, with sufficient power to give and bequeath the same at her decease, to whomsoever she will, excepting to her second husband, or any from or under him. I give and bequeath the other moiety, or undivided half part of my said 500 acre tract of land unto my three sisters, Anne, Catharine and Rebecca, each one-third part, to them, their heirs, and assigns for ever. My will is, that there be no water-works built or erected on any part of the said 500 acre tract of land for the space of, &c. I give and bequeath my tract of land lying, &c., unto my sister Anne, and to her heirs and assigns for ever; under and subject to the yearly rent of 40*s.* &c., to be paid to my loving wife, Anne Johnson, and to her heirs and assigns for ever. I give and bequeath unto my sister Catharine, my twenty and odd acres of land, lying &c., and the appurtenances; also, twelve acres of wood-land to be cut off a large tract adjoining, &c., to be holden by her, her heirs and assigns for ever, under and subject to the yearly rent of 6*l.*, to be paid to my loving wife, Anne Johnson, her heirs and assigns for ever, and also subject to as much firewood as my wife shall have occasion for, when she comes to live at Germantown. I give, devise and bequeath to my sister Rebecca, and her son Paul, all that my tract of land (the remainder after the said twelve acres are taken off), containing fifty acres, more or less, adjoining, &c., to be holden to them, their heirs and assigns for ever, under and subject to the yearly rent of 4*l.*, to be paid to my loving wife, Anne Johnson, her heirs and assigns for ever; the said tract not to be sold till Paul arrives at thirty years of age. I give and bequeath unto my sister Anne, all that tract of twelve acres, opposite the last-mentioned 500 acres, &c., to her heirs and assigns for ever. I give and bequeath 50*l.* to the poor-house keepers of Germantown, &c. I give and bequeath 50*l.* to the use of the Pennsylvania Hospital. As concerning all the rest and residue of my effects, bills, bonds, mortgages, moneys and estate whatsoever, not herein before given, I would have divided equally between my loving wife Anne, and my sisters, Anne, Catharine and Rebecca, part and share alike, to each of them, their heirs and assigns for ever. And I do appoint and nominate my loving wife, Anne Johnson, &c., to be executors of this my last will and testament."

*The question for the opinion of the court, on this plea and case, is, whether, upon the whole will, the devises and bequests therein contained, or any of them, to the said Anne, the demandant, made, are sufficient in law to bar the said Anne from recovering her said dower. [*417

The cause was argued, at the last term, by *Sergeant* and *Bradford*, for the demandant; and *Coxe* and *Lewis*, for the tenants: and now the Chief Justice delivered the opinion of the court to the following effect:—

McKean, Chief Justice.—Two questions have been made on this record, in the discussion of which, the law relating to the subject has been exhausted: The first is, "Whether the devises to the demandant in the will of Richard Johnson, shall be deemed a satisfaction of her dower?" And

the second is, "Whether, by the action of partition brought by the demandant, wherein it is acknowledged that the moiety out of which dower is now claimed, belonged to the tenants, she is not stopped from recovering in this action?"

In delivering our opinion on this occasion, we shall avoid a recapitulation of the arguments offered by the counsel on either side; confining ourselves to the questions proposed, a brief statement of the reasons of our judgment, and a reference to the books, on which we rely, as authorities to support it.

1. Dower is a legal, an equitable and a moral right. Prec. in Chan. 244. It is favored in a high degree by law, and, next to life and liberty, held sacred. Lill. Abr. 666, G. Three incidents entitle a woman to dower: marriage, seisin and the death of the husband. 1 Inst. 32 *a*, *b*. And a widow may be barred of dower by a jointure made in pursuance of the statute of 27 *Hen. VIII.*, *c.* 10, § 6. Such a jointure may, indeed, be made either before or after marriage; but with this difference, that if it is made before, the wife cannot waive it, and claim her dower at common law; which she can do, if the jointure is subsequent to the marriage. No other settlements, however, in lieu of jointures, are bars to a claim of dower; nor, it must be remembered, was a jointure itself any bar, antecedent to the passing of the statute of *Hen. VIII.*, for it is established law, that a right or title of dower, cannot be barred by a collateral satisfaction. Wood's Inst. 125; 1 Inst. 36 *b*. Nor, in short, by anything but a plain and express intention of the parties. Ibid.; Finch, 368; 1 Chan. Ca. 181; 2 Ibid. 24; 2 Vent. 340; 4 Co. 1, 2.

In the will before the court, it is nowhere expressed, that the devises to the demandant shall be in lieu of dower; but it is contended, that the intention of the testator, collected from the words of the whole will, appears to be, that the demandant shall be barred of her claim at common law; that the devises to her are of lands in fee; and that these, being of four times the value of her dower, ought to be considered as a recompense or satisfaction for *it. But in the words of the whole will, we can discover no express intention to that purpose; and, although an estate for life, or even during widowhood (which is the same as an estate for life, since it is in the wife's own power to make it such; and these by the bye, are the lowest estates that will operate in bar of dower, either in a jointure or will), may be given with the view, and operate to bar a widow's claim at common law; yet, it must appear to be so intended, by the words of the will, and not inferred from its silence, or presumed upon conjecture. For no devise to a wife, even of an estate in fee-simple, although ten times more valuable than her dower, will be, of itself, a bar of dower; but it will be considered as a benevolence, and she is entitled to both. 2 Freem. 242; Prec. in Chan. 133.

*418]

Nor, in such a case, will equity interpose against the wife; for I cannot find any instances in which relief upon this subject has been given, but in the following: 1st, Where the implication, that she shall not have both the devise and the dower, is strong and necessary; 2d, Where the devise is entirely inconsistent with the claim of dower; and 3d, Where it would prevent the whole will from taking effect: that is, where the claim of dower would overturn the will *in toto*. 3 Atk. 437.

In short, the authorities are numerous and explicit, that dower cannot be

barred by a collateral recompense; that the devise of anything to a wife, cannot be averred to be in bar of dower, because a will imports a consideration in itself; and that the devise, without other matter, is to be taken as a benevolence, and the devisee deemed a purchaser. 4 Co. 3, 4; 9 Mod. 152; 2 Vern. 365; 2 Freem. 242; Prec. in Chan. 133; 2 Will. 624; 3 Atk. 8, 436; 1 Ld. Raym. 438; 1 Lutw. 734; Brook (tit. Dower), pl. 69; Dyer 248; 1 Ves. 55, 230; 2 Eq. Abr. 388, pl. 14, 18; 1 Ibid. 219; 1 Brown Chan. Rep. 292. To which may be added, two decisions in this court, *Blackford et ux.* v. *Kennedy*, in 1769; and *Kennedy et ux.* (the present demandant) v. *Wistar*, 1779.

The court, therefore, unanimously think, that the devises to the demandant, in the will of Richard Johnson, cannot be deemed a satisfaction or bar of dower in this action.(*a*)

2. The second question inquires, whether the demandant is barred in this action, by the recovery in the action of partition? And, in support of the affirmative, the counsel for the tenants have cited 1 Roll. Abr. 862, pl. 4; 864, pl. 8; Co. Litt. 27 *a*.

Dower is an excrescent interest taken out of the inheritance for a time, which being elapsed, the interest falls again to the owner of the inheritance. But the institution of the action of partition became necessary to appropriate a moiety of the 500 acres of land to each of the devisees, not merely for life, but for ever; for the judgment is, that the partition should remain firm and stable for ever. If, then, any other person than the demandant had a right of dower in the whole of the 500 acres, although such person could not have been made a party in the partition, the partition *might certainly have [*419
been effected, notwithstanding that right of dower. And why should not the same be done, in the case before the court? The devisee held the moiety allotted to her, subject to the claim of dower, and in doing this, there was nothing inconsistent or uncommon: Nor can we perceive, how the recovery in partition, estops the demandant from saying, that she has a claim of dower in that part of the premises which has been assigned to the tenant. As, indeed, on the one hand, there is no case, nor *dictum* of any judge, to warrant this plea, so, on the other, we think reason and justice are against it. The case cited by the counsel for the tenants only says, that, in dower, the demandant claims dower of lands *unde nihil habet, &c.*, and therefore, she shall be stopped from claiming anything more.

Upon the whole, the COURT are clearly of opinion, and direct, that judgment be entered for the demandant.

(*a*) See the act of 4th April 1797 (3 Sm. Laws, 300); and Evans *v.* Webb, 1 Yeates 424; Webb *v.* Evans, 1 Binn. 566; Hamilton *v.* Buckwalter, 2 Yeates 389; McCullough *v.* Allen, 3 Id. 10; Creacraft *v.* Dille, Id. 79; Creacraft *v.* Wions, Addis. 350; Duncan *v.* Duncan, 2 Yeates 302; Sample *v.* Sample, Id. 433; Wilson *v.* Hamilton, 9 S. & R. 424.

ZANTZINGER *v.* POLE.

Practice—Sheriff's sale.

If the highest bidder at a sheriff's sale be unable to pay, he may offer the property to the next highest; or, he may return, that the premises were knocked down to A., for so much, that the latter has not paid the purchase-money, and therefore, the premises remain unsold.

A MOTION being made for a rule upon the sheriff to return a *venditioni exponas*, the CHIEF JUSTICE, upon a doubt expressed by that officer, said, that, by the spirit and words of the act of assembly, the sheriff must sell not merely to the *highest*, but to the *best* bidder; that, therefore, if the highest bidder was unable to pay, the sheriff might make an offer to the next highest; and that if the property was not paid for, after a sale, the return should be, that "the premises were knocked down to A. B., for so much, that the said A. B. has not paid the purchase-money, and that, therefore, the premises remain unsold." (*a*)

PATTON *v.* CALDWELL.

Special verdict.

Where several suits had been instituted on a policy of insurance, and an agreement had been signed by all the underwriters, to be bound by one verdict, it was ruled, that a special verdict given in that action might, be read as evidence, in a suit against another of the underwriters, though not as conclusive.

THIS was an action on a policy of insurance, upon the trial of which, *Lewis*, for the plaintiff, offered to read in evidence a special verdict that had been given in another action upon the same policy, but against a different underwriter. *Sergeant* and *Ingersoll* objected, that the verdict was given between other parties, and therefore, not admissible; upon which *Lewis* proved an agreement of all the underwriters to be bound by one verdict.

MCKEAN, Chief Justice.—The objection turns upon this principle, that the defendant had no opportunity of cross-examining, upon the former trial; and the answer is, that he, with the rest of the underwriters, had agreed to be bound by one verdict; which is certainly the only ground for offering the evidence proposed by the plaintiff's counsel.

*420] *Whether this agreement was made in person, or by a broker mutually employed, it is equally binding on the parties; and, under the agreement, all the underwriters were fully entitled to interfere upon the former trial, and to cross-examine the witnesses then produced. Although, therefore, we should not have allowed the special verdict to be read, without full proof of the agreement; yet, on receiving that satisfaction, we think it would be unfair to suppress it; and, for the future, we desire, that all such agreements may be entered on the records of the court.

The admission of this evidence, however, cannot be conclusive; as it is manifest, that testimony has been given on the present occasion, different from what was given on the former; and, consequently, a very different verdict may, with great justice and propriety, take place. (*b*)

(*a*) Friedly *v.* Scheetz, 9 S. & R. 164.[1]

(*b*) See Hostetter *v.* Kaufman, 11 S. & R. 146; Brindle *v.* McIlvaine, 10 Id. 282; McKinney *v.* Crawford, 8 Id. 351; Simonton *v.* Boucher, 2 W. C. C. 478.

[1] See Holdship *v.* Doran, 2 P. & W. 16–18.

HAMILTON, Executor, *v.* CALLENDER'S executors.

Satisfaction.

A. mortgaged lands to B., and after his death, his executors sold part of the mortg.ged premises to C., who assumed payment of the principal and interest, and gave his bond to B., for the interest due; no receipt was given on the mortgage, for the amount of this bond, and it did not appear, that it was accepted by B. as satisfaction: *Held*, that the bond was not a payment *pro tanto*, so as to discharge the executors of A.

THIS action being referred by consent, the following report was made: "The referees, upon full consideration of all the circumstances, are doubtful as to the law upon one point, and have agreed to make their award special, subject to the opinion of the court.

"The case submitted to them appeared to be as follows: On the 16th of March 1773, Robert Callender was indebted to James Hamilton in the sum of 2120*l.* sterling, for which he gave to the said James Hamilton, a bond and warrant of attorney, and a mortgage upon an estate in the county of Cumberland. It appeared, that interest was paid thereon to March 1776, and that receipts for such payments are indorsed on the mortgage.

"Robert Callender died, and some time after, his executors sold part of the mortgaged premises to Mark Bird, who undertook to pay off the principal sum, together with the interest that should become due, after the date of his purchase.

"It is agreed, that James Hamilton remitted one year's interest to the executors of Callender; and that Mark Bird gave his bond, bearing date the 3d of May 1783, to James Hamilton, for 651*l.* sterling, being the whole of the interest then due on the mortgage, exclusive of the year's interest remitted. No discharge was given upon the mortgage, either for the year's interest remitted, or for the amount of the bond; nor does it appear, that the executors of Callender had any notice of the bond, or that they had been applied to for the payment of any interest, after the sale to Bird.

"Bird has never paid any part of the principal or interest: and in the end of the year 1784, a *scire facias* issued on the mortgage; but the sale was postponed from time to time; and, in the meantime, Bird became a bankrupt. On the 19th of May 1787, however, the estate held by Bird was sold under the *scire *facias*, for 5500*l.*: and another part of Callender's estate was sold, under the same execution, for about 1000*l.* [*421

"The point which the referees wished to submit to the opinion of the court is:—Whether James Hamilton, by taking the bond from Bird, under the circumstances stated, has exonerated the executors of Callender from the payment of 651*l.* sterling, the sum for which the said bond was given? Or, whether the mortgaged premises are bound to the executors of Hamilton, notwithstanding the said bond?

"If the court shall be of opinion, that the estate of Callender is exonerated from so much of the interest as the bond of Bird was given for, then we find, that there was due to the executors of Hamilton, on the 19th of May last (when the premises were sold), for principal and interest upon the mortgage, 4988*l.* 18*s.* 2*d.* current money of Pennsylvania. But, nevertheless, if the court should so determine, the referees award, that the whole of the money arising from the sale of that part of the mortgaged premises belonging to Bird, and which is stated to have sold for 5500*l.* should be applied, in the

first place, to the payment of the aforesaid sum of 988*l.* 18*s.* 2*d.* and the residue to so much of Bird's bond to Hamilton, as it will extend to.

"But if the court shall be of opinion, that the executors of Callender are not exonerated from the payment of so much of the interest as the bond aforesaid specifies, then we award, that there was due from the defendants to the plaintiff, on the 19th day of May last, the sum of 6264*l.* 18*s.* 7*d.* current money aforesaid."

Whether the bond given by Mark Bird to the plaintiff's testator operated as an extinguishment of so much of the money due upon Callender's mortgage, was the question? And it was argued, in July term 1788, by *Lewis* and *Wilcocks*, for the plaintiff, and by *Wilson* and *Bradford*, for the defendant.

For the *plaintiff*, it was contended, that the bond in question was taken merely as a collateral security, in order to entitle Hamilton to interest upon the amount. The report (though it is sufficient to give judgment upon) does not say, that it was received or given in satisfaction; it is, therefore, to be presumed, that no evidence of that kind was submitted to the referees, and the court must determine the law, upon the facts contained in the report.

But even if the report was amended, and it were expressly set forth, that the bond was given and received in satisfaction, it would not be an extinguishment of the preceding demand, founded on the mortgage. The rule is clear, that a subsequent security, of equal dignity, is not an extinguishment, so as to annihilate the party's remedy upon his original contract; for that purpose, the security must be of a higher nature. Nor will the mere improvement of the security, by adding another surety, amount to an ex-
*422] tinguishment *(Cro. Jac. 579; Hob. 68, 69; Moore 872; Cro. Car. 85, 86; see 2 Bac. Abr. 452); whether, indeed, by accord or not, one bond is not an extinguishment of another (3 Lev. 55; Brownl. 47, 71). Nay, the party's own agreement to accept is not sufficient; for, it must appear to be a reasonable satisfaction. 1 Str. 426–7.

The bond given by Bird was certainly not of a higher nature than the previous security; it was, in fact, inferior; for a mortgage is a security on real estate, a bond is only personal; and in the case of a bankruptcy, though neither bonds nor judgments stand against the general creditors, yet mortgages do.

For the *defendants*, it was urged, that the legal doctrine of collateral extinguishments does not apply; for some cases go further than those produced, and show that an estate worth a million, would not discharge a bond conditioned for the payment of 10*l.* Yet, at common law, the doctrine appears to differ from what the adverse counsel wish to establish (Co. Litt. 212 *b*); though, it must be admitted, that many subsequent decisions have greatly deviated from the principle laid down by Lord Coke, that the party's acceptance of anything, provided it be not of less value than the original contract, in satisfaction, is sufficient. But notwithstanding the admission that the authorities seem now to extend so far, that a bond from the same party, increasing the sum, or, even where another surety is added, will not be a discharge of a prior obligation; yet, none of them are so extrava-

gant as to assert, that it is no discharge, where the advantage of converting interest into principal has been obtained; which is, in itself, a reasonable satisfaction to ground the extinguishment; and independently of the cases, the broad principle of equity declares, that when a party is bettered by his bargain, he shall be bound by it.

But, it appears from the report of the referees, that there was an absolute giving and taking of the bond; and as the payment must be according to the will of the defendant (Cro. Eliz. 68), if Bird gave the bond in question, in payment, we show that it was accepted, and it is no matter whether that acceptance was in satisfaction, or not, since the bond must be received to the intent with which it was given. 1 Ld. Raym. 60, 61.

The case, however, does not, after all, depend upon the doctrine of extinguishment, but upon the act for defalcation; by virtue of which the acceptance of the bond in question may be given in evidence by way of set-off against the plaintiff's demand. (1 Sm. L. 49.)

For the *plaintiff*, in reply, it was insisted, that the object of the act of defalcation was to prevent a multiplicity of suits, and that it could have no possible effect upon the general question, whether Bird's bond operated as a payment or extinguishment *pro tanto* of the preceding debt? This question has been agitated in England, as well since as before the statute, and the present idea has never been suggested. The act of assembly speaks of two or more being mutually indebted; and, although it authorises a defalcation, *it does not define what shall be deemed a payment or extinguishment. [*423

There is no fair ground to assert that Hamilton received an adequate satisfaction, by converting the interest into principal; for he was entitled to have his interest punctually paid; and the books of chancery have gone so far as to declare, that, where money is in arrear upon a mortgage, it was not usury to take interest upon the interest. In the case from Cro. Jac. 579, indeed, the interest was also added to the principal; but this the court did not consider a sufficient bar. Nor was Hamilton benefited in respect to time; for the bond was given not to shorten the period of payment but to protract it: as the money was actually due, and ought to have been previously paid.

After considering the case and arguments, the chief justice, at the present term, delivered the opinion of the court.

McKean, Chief Justice.—The case appears to be this: That the testator of the defendants gave a mortgage to the testator of the plaintiff, on four several tracts of land. The heirs of the mortgagor sold the equity of redemption of three of these tracts to Mark Bird, who, afterwards (on the 3d day of May 1783), executed a bond for 651*l.* to the mortgagee; and this bond being for the amount of the interest then due upon the mortgage, also bore interest. No receipt, however, for the bond, for the interest, nor, indeed, any minute of the proceeding, was entered upon the mortgage; nor has any express proof been offered, that the bond (upon which there has not been anything paid) was accepted as a satisfaction *pro tanto* of the money due on the mortgage. The three tracts of land conveyed to Mark Bird have been sold, in order to satisfy the mortgage; but proving insufficient, the question now arises, on the circumstances which I have stated, whether the

bond given by Mark Bird is to be taken, either in law or equity, as a payment, discharge or recompense for so much of the mortgage-money?

The court, having maturely considered the case, are of opinion, that the bond is not a payment *pro tanto* of the mortgage-money: for which opinion they will content themselves with declaring the general principles, and referring to the authorities whence those principles are deduced.

1. First, then, one judgment cannot be pleaded in bar of another, which is of *equal* nature and dignity, no more than one bond or obligation can be pleaded in bar of another. Cro. Eliz. 817; 2 Bac. Abr. 552.

2. In the second place, a bond, which is no satisfaction of another bond, cannot be deemed a satisfaction of a mortgage, which is a security of a *higher* nature. To render it a satisfaction, it ought to better the plaintiff's case, in point of safety, and expedite the time of payment; for a bond with sureties will not be a satisfaction of one without, unless the time of payment
*424] is thereby *shortened. 1 Str. 427; 1 Brownl. 47, 71; Hob. 68, 69; 1 Mod. 225; 2 Id. 136; Cro. Jac. 579; Cro. Car. 85, 86; 3 Lev. 55; 1 Salk. 124; 1 Burr. 9; 2 Wils. 87.

3. And in the third place, as there is no entry of the bond in question upon the mortgage, showing that it was received in payment or satisfaction of the interest then due, nor any proof that it was so intended by the parties, a presumption naturally arises, that the bond was merely taken as a collateral or supplementary security; and no debt or duty can be extinguished, but by a security of a higher nature than the first.

For these reasons, we decide the question submitted by the referees to the court, in favor of the plaintiff, and direct judgment to be accordingly entered upon the report.(*a*)

De Haven *v.* Henderson.

Evidence.—Oath of party.

The plaintiff was examining a witness to prove the purport of an order given to him by the adjutant-general, during the late war, for the restoration of his horse, saddle and bridle, which had been seized by the defendant, as the property of a disaffected person, although upon trial the plaintiff was acquitted, when *Levy* objected, that the order itself ought to be produced, or some account given of its loss, before the witness was admitted to give evidence of its contents.

McKean, Chief Justice.—The oath of the plaintiff must be received to prove what has become of the order. It is, I think, the only way in which satisfactory information can be obtained on a point of this nature.(*b*)

(*a*) See Musgrove *v.* Gibbs, *ante*, p. 216, and the cases cited in the note.[1]

(*b*) See the note to The King *v.* Lukens, *ante*, p. 5.

[1] The receipt of a security of equal degree, either from the debtor, or from a stranger, is no extinguishment of the original cause of action. Oliphant *v.* Church, 19 Penn. St. 318. Whether it is to operate as a satisfaction, by substitution, depends on the intention of the parties. Reed *v.* Defebaugh, 24 Id. 495. The transfer of a chose in action to a creditor is presumed to be a collateral security, not a satisfaction, unless so expressed. Leas *v.* James, 10 S. & R. 307; Stone *v.* Miller, 16 Penn. St. 450; League *v.* Waring, 85 Id. 244. And see Bank *v.* Cheney, 10 W. N. C. 187.

The plaintiff being accordingly sworn, and proving the loss of the order, he was allowed to proceed in examining the witness as to its contents.

Lessee of THOMSON *et ux.* *v.* WHITE.

Parol evidence, when admissible.

Husband and wife, having no children, convey the estate of the wife to A., who reconveys the estate to them, as joint-tenants in fee, under a parol agreement between the husband and wife, that the husband should settle the fee upon the wife's heirs; the husband having died without settling the estate, it was *held*, that parol evidence of this agreement was admissible.[1]

EJECTMENT for a house and lot in Second street, in the city of Philadelphia. The action was tried by a jury at bar, in January term 1788, and a verdict given for the plaintiff. A motion was then made, by the defendant's counsel, for a new trial, which was argued, in favor of the new trial, by *Lewis* and *Heatly*, and against it, by *Ingersoll* and *Sergeant*, in January term 1789; and the court having continued the cause under advisement, gave their opinion in the present term.

The case upon the evidence was as follows: Dorothy Gordon, being seised in fee of the moiety of the premises in question, intermarried *with Laurence Saltar, and having lived long with him, and no pros- [*425
pect of children, she was desirous of making a provision for an only sister of the whole blood, to wit, Mary, one of the lessors of the plaintiff, whose husband, John, the other lessor, was considerably reduced in his circumstances. It then appeared, that Mrs. Saltar, while upon a visit, with her husband, to his brother, John Saltar, who resided at some distance, was taken sick; and after a conversation relative to her estate, it was agreed by her husband and herself, that it should be settled on them for their lives, and for the life of the survivor of them, and afterwards, that it should go to her sister, the said Mary Thomson, for life, and the heirs of her body lawfully begotten; and for want of such heirs, to the children of her three sisters of the half-blood. Mr. Saltar, accordingly, procured a deed of the above effect to be drawn by a conveyancer in Philadelphia; but the second remainder being expressed to be "for the issue of the bodies of the three half-sisters," one of whom was unmarried, Mrs. Saltar, when the instrument was read to her, thought the expression indelicate with respect to her three half-sisters, and for that reason, persisted in refusing to execute it, notwithstanding all the persuasion of her friends. Upon this refusal, her husband proposed to her, that a deed should be drawn from them to his brother John, who, with his wife, should reconvey the premises to him (the said Laurence) and herself, as joint-tenants, in fee; and he promised that as soon as he got home, he would make his will, or by some other means, settle the estate in the manner that they had before projected. Mrs. Saltar hesitated at this proposition; but, on her sister, Elizabeth Saltar's, telling her, that, "she might rely upon him; for, if there was a man in the world, who could be trusted in such a case, it was him;" and on her husband's requesting her

---

[1] This case went upon the ground of fraud, and is a land-mark in our law, which has been frequently followed. Wolford *v.* Herrington, 74 Penn. St. 314; SHARSWOOD, C. J. Overton *v.* Tracey, 14 S. & R. 326, DUNCAN, J., and cases cited.

to comply, declaring, that "if there was faith or truth in man, he would honestly perform what he again promised;" she executed the deed to John Saltar, who, with his wife, reconveyed the estate, according to the previous stipulation. Mrs. Saltar died in the year 1781, about six months after the deeds were signed; and her husband died, intestate and without issue, about eighteen months after her decease. Mr. Laurence Saltar always, during his lifetime, managed the estate that had been his wife's, as if it belonged to the lessors of the plaintiff; in his last sickness, indeed, when near expiring, he told his brother, that he was very uneasy on account of his leaving no will; and soon after this declaration, he lost his reason.

The preceding facts were proved by John Saltar and Elizabeth, his wife; together with the confession of the defendant, that the lessors of the plaintiff had the title in equity, although he had it in law.—There was, indeed, a contradiction, in some respect, of the case of the lessors of the plaintiff, in the testimony of Abel James, who related a conversation which he had with Laurence and Dorothy Saltar, a few days before the deeds were executed,
*426] at which time, *the witness said, that they had agreed to settle the estate in a different manner.

The motion for a new trial was made, on two grounds: 1st, Because the parol evidence ought not to have been admitted to go to the jury; and 2d, Because the jury gave a verdict against evidence.

The Chief Justice having stated the case, and the objections to the verdict, proceeded to deliver the opinion of the court in the following manner:

McKean, Chief Justice.—The court have heard the reasoning in support of the motion, and the arguments against it; and upon a perusal and full consideration of the cases cited on both sides, our opinion is unanimously formed in favor of the plaintiff.

In support of the first ground assigned for a new trial, it has been urged, that the parol proof contradicted the deed given by the witnesses themselves; that in Pennsylvania, lands must pass by deed, will, or some writing signed by the parties, or by the act and operation of the law; that a declaration of uses must be by deed; that no parol evidence should be admitted respecting an agreement or deed, which may add to, diminish, vary or contradict the agreement or deed, but only to explain it; and that John Saltar and his wife were estopped from saying anything against their own deed. In corroboration of these positions, the following books have been cited: Cowp. 47, 260; 2 W. Black. 1250, 335, 327; 2 Atk. 383; 3 Id. 388; 2 Wils. 506; 3 Id. 275; Bac. Max. 90, Regula, 23; 1 Black. Com. 78, 79; 2 Id. 13; 3 Id. 439; Bull. N. P. 357; 5 Bac. Abr. 362; Brown Chan. Cases, 92, 94; 2 Bac. Abr. 309; 1 Wils. 111; Fitzgib. 213; 1 Bac. Abr. 75; 1 State Laws, 462–3.

Since the statute of frauds and perjuries, in England, and the act of assembly for preventing frauds and perjuries in Pennsylvania, it has, indeed, been a general rule, that no estate or interest in lands shall pass, but by deed, or some instrument in writing, signed by the parties; and that no parol proof shall be admitted to contradict, add to, diminish, or vary from a deed or writing.(*a*) But it is certain, that there are several exceptions to this rule,

(*a*) The cases in the Pennsylvania reports, recognising this rule, are very numerous,

and many cases may be found in which parol proof has been admitted, notwithstanding writings have been signed between the parties. For instance, where a declaration is made *before* a deed is executed, showing the design with which it was executed, the decisions in the court of chancery, have been grounded upon *parol* proof ; and in the case of *Harvey* v. *Harvey*, 2 Chan. Cases, 180, three successive chancellors decreed, on the parol evidence of a single witness, against a deed of settlement. See Fitzg. 213, 214.

In cases of fraud, and of trusts, though no trust was declared in writing, exceptions have likewise taken place: *Thynn* v. *Thynn*, 1 Vern. 296.(*a*) As, where an *absolute* deed was given, but intended to *be in trust ; on parol proof of the party's intention, the trust was decreed. *Hampton* v. *Spencer*, 2 Vern. 288, *et è contrà*. And the same decision was pronounced, in the case of an agreement or trust being confessed by an answer, although such trust had only been declared by parol. *Bellasis* v. *Compton*, Ibid. 294 ; *Croyson* v. *Banes*, Prec. in Chan. 208. So, where a party is drawn in, by assurances and promises, to execute a deed, to enter into a marriage, or to do any other act, and it is stipulated that the treaty or agreement should be reduced into writing ; although this should not be done, the court, if the agreement is executed in part, will give relief. A man treating for the loan of money on a mortgage, it was agreed, that an absolute deed should be given by the mortgagor, and a deed of defeasance executed by the mortgagee ; the absolute deed being given, the mortgagee refused to execute the defeasance, but the court of chancery interposed to enforce justice agreeably to the agreement of the parties. Prec. in Chan. 103–4; Skin. 143 ; 9 Mod. 88. In another instance, where an absolute conveyance is made for a certain sum of money, and the person to whom it is made receives interest for the money, the receipt of the interest will be admitted to explain the nature of the conveyance. Prec. in Chan. 526; 1 Wils. 620; s. c. 2 Freem. 268, 285. [*427

There are other authorities which bear a strict analogy to the case before us. A copyholder, intending to give the greatest part of his estate to his godson, and the residue to his wife, was persuaded by the latter to nominate her to the whole, declaring that she would give the godson the part designed for him ; after her husband's death, she refused to perform this promise, and pleaded the statute of frauds and perjuries, but the decree was against her. Again, a father being about to make a will to provide for his younger children, is prevented by his son and heir apparent's promising, that he would make the provision for his brothers and sisters ; the son and heir afterwards refused to fulfill this engagement ; but, on an application to the chancellor, the decree was also against him. So, where the issue in tail persuades the

---

and sufficiently familiar to the profession. It may be enough to refer to the following, as the leading decisions on the subject. O'Hara *v.* Hall, 4 Dall. 340 ; McDermot *v.* United States Ins. Co., 8 S. & R. 609 ; Cozens *v.* Stevenson, 5 Id. 421 ; McWilliams *v.* Martin, 12 Id. 259 ; Wright *v.* Deklyne, Peters C. C. 204 ; In Iddings *v.* Iddings, 7 S. & R. 145, C. J. Tilghman, expressed his inclination rather to narrow than enlarge the opening for the admission of parol evidence.

(*a*) Drum *v.* Simpson, 6 Binn. 482; Christ *v.* Deffebach, 1 S. & R. 464; Iddings *v.* Iddings, 7 Id. 114 ; McMeen *v.* Owen, 1 Yeates 135; s. c. 2 Dall. 173 ; Zantzinger *v* Ketch, 4 Id. 132 ; Miller *v.* Henderson, 10 S. & R. 292 , Hayden *v.* Mentzer, 10 Id. 329; and many other cases to the same effect.

tenant in tail not to suffer a recovery, in order to provide for younger children, upon an assurance that the tenant in tail would provide for them himself, which he afterwards refuses, equity will compel him to do it. *Devenish* v. *Baines*, Prec. in Chan. 3; *Chamberlaine* v. *Chamberlaine*, 2 Freem. 34.

A voluntary settlement is made by A. to B., who, afterwards, without any consideration, agrees to deliver it up: this agreement shall bind in equity; for a *voluntary* settlement may be surrendered *voluntarily*. *Wentworth* v. *Deverginy*, Prec. in Chan. 69.

The statute and act of assembly were made to prevent *frauds*, as well as *perjuries*; they should be construed liberally, and beneficially expounded for the suppression of cheats and wrongs. Thus, where there has been a fraud in gaining a conveyance from another, the grantee may be considered as a mere trustee. *Lloyd* v. *Spillet*, Barnard. in Chan. 388. *In the case now under consideration, Mrs. Dorothy Saltar was seised in fee of the premises stated in the ejectment; and had she made no conveyance, her sister, Mary Thomson, would have been her heir-at-law; but her husband, whom she loved, wished to enjoy the estate during his life, and she designed that her sister, and her sister's children, should have the estate uncontrolled by her husband. With this view, the deeds were executed; and if the solemn promise and agreement of Laurence Saltar is not to be enforced, his heir-at-law will have the estate, contrary to the intention of all parties.

*428]

The question then is, whether the engagement of Saltar, not being in writing, although it concerns lands of inheritance, is void by the act of assembly for preventing frauds and perjuries?

We are of opinion, that it is not; and that the parol evidence was proper to be admitted upon the trial of the cause.(*a*) Here was a breach of trust in Laurence Saltar, *a fraud in law*, which is not within the act. This is the reason of our judgment; a reason warranted by a due construction of the act, and an attentive consideration of its frame and design; which was not only to guard against perjuries, but also, as I have already observed, against frauds. It is to be remembered, that there is no purchaser, *bona fide*, for a valuable consideration, without notice, in the present case; the defendant claims under the heir-at-law of Laurence Saltar; he ought, therefore, to perform what Laurence should have performed; and equity will consider that as done, which ought to have been done; Grounds, &c., of Law and Equity, 75. Every man's contract (wherever it is possible) should, indeed, be performed as it was intended.

The numerous cases cited, as well as some determined in this court, both before and since the revolution (several of which are in point) all turn upon the same principle, and are uniformly in favor of the plaintiff; and so many uniform, solemn decisions, ought to be always of great weight and consideration, that the law may be certain. I am glad, indeed, that the present motion has been made, because it has afforded an opportunity of full deliberation on the subject, and of settling it upon a satisfactory and permanent foundation.

With respect to the second objection, we are clearly of opinion, that the

---

(*a*) See Gregory *v.* Setter, *ante*, p. 193; and German *v.* Gabbald, 3 Binn. 302; Wallace *v.* Duffield, 2 S. & R. 521; Peebles *v.* Reading, 8 Id. 492.

verdict was given agreeable to the weight of the evidence. And upon the whole, direct, that judgment be entered for the plaintiff.

D'Utricht *v.* Melchor.

Evidence.— Vendor and purchaser.

In an action of *assumpsit* for money had and received, to recover back the purchase-money of land, it was *held*, that the deed from the defendant to the plaintiff, was admissible in evidence to prove the amount paid, &c.; and that to maintain the action, it was sufficient for the plaintiff to prove, that the defendant received the money by mistake, imposition or deceit.

This case was tried at bar, in September term 1788, and a verdict being found for the plaintiff, the defendant obtained a rule to show cause why a new trial should not be granted; which was argued at the present term by *Coxe* and *Sergeant*, in support of the rule, and by *Lewis* and *Heatly*, against it.

*It appeared, that the plaintiff had bought a tract of land from the defendant, who had previously purchased it of one Simpson; but as, upon inquiry, no land of the description contained in the defendant's deed to the plaintiff could be found, this action, which was an action of *indebitatus assumpsit* for money had and received to the plaintiff's use, was brought, in order to recover back the consideration-money that had been paid; and on the trial, the defendant's deed was given in evidence, to prove the amount and acknowledgment of such payment. The declaration also contained a count in the nature of deceit; but by agreement of the counsel, it made no part of the argument, whether this could properly be coupled with the *assumpsit;* so that the motion for a new trial was supported only upon these grounds: 1st, That the action of *assumpsit* would not lie; and 2d, That the deed ought not to have been given in evidence upon the trial. [*429

For the *defendant*, it was contended, that, as there was no suggestion of fraud to vitiate and annul the original contract of the parties, the proper action was covenant, on the words grant, bargain, &c.; that if there was fraud, the remedy was an action of deceit; that *assumpsit* would not lie; that if there was any deceit in the words of the deed, still the action might have been brought upon the deed itself; that a deed cannot be given in evidence, to support an action of *indebitatus assumpsit;* that there was no proof of a parol *assumpsit;* and that the defendant could not plead a verdict in the present suit, in bar to another action of covenant upon the deed. See Com. Dig. 145, *F;* 1 Cowp. 414, 418, 818, 819; Doug. 132; 1 State Laws 79; 1 Salk. 210; Cro. Jac. 506; 1 Roll. Abr. 278; 1 Vin. Abr. 277; 2 W. Black. 1249; Gilb. L. of Ev. 183; 12 Vin. 190.

For the *plaintiff*, it was answered, that whenever natural justice implies that the party ought to refund, this action, which is like a bill in equity, will lie to compel him; that the deed was not the foundation of the action, but given in evidence merely to show the amount of the consideration-money, and the defendant's acknowledgment of its being paid; and that the declaration was supported by the precedent in Doug. 18. See Salk. 22; 1 Lev. 102; Bull. N. P. 31; 2 Str. 915; 1 Ld. Raym. 742; 2 Burr. 1088; Salk. 284.

The case being held for some days under advisement, the chief justice now delivered the opinion of the court to the following effect:

McKean, Chief Justice.—It is unnecessary at this time to determine, whether the plaintiff might have instituted an action of covenant, or deceit, in order to obtain a redress of the wrong which he has sustained; for we think it is sufficient for his purpose, that an action of *assumpsit* for money had and received to his use, has been brought; and that, to maintain this action, he may give in evidence, that the defendant got his money by mistake, imposition or deceit. To prove the alleged mistake, imposition or de-
*430] ceit, *deeds or other writings, which are not the immediate foundation of the suit, but only leading to it, may be read. We are all, therefore, of opinion, that a new trial ought not to be granted.

Judgment for the plaintiff.(*a*)

Oxley *et al. v.* Oldden.

Reference.—Practice.

This cause had been referred, and the referees, having examined the evidence, in presence of both parties, agreed upon their report, but about an hour before it was delivered into court (though it was signed the preceding day), *J. B. McKean*, on behalf of the defendant, had obtained a rule to show cause why the rule of reference should not be stricken off.

There was no charge of irregularity or partiality against the referees; and after argument by *Lewis*, for the plaintiffs, and *Ingersoll* and *J. B. McKean*, for the defendant, the rule to show cause was discharged. And—

McKean, Chief Justice, observed, that the motion was much too late to annul the reference, when the referees had investigated the whole transaction, had agreed upon their report, and were clear from any imputation of misconduct, or any precipitancy in refusing to hear the testimony offered by either party.(*b*)

(*a*) In Weaver *v.* Bentley, 1 Caines 48, Judge Livingston is reported to have said, "The case of D'Utricht *v.* Melchor, 1 Dall. 428, cannot be law." The majority of the court, however, differed in opinion from Judge Livingston, upon the principle of that case, and held, that *assumpsit* would lie, to recover back the consideration paid on a sealed agreement, the defendant having failed to perform his part; and it is believed that D'Utricht *v.* Melchor, which is said by Judge Yeates (in Ritchie *v.* Summers, 3 Yeates 539), to be "imperfectly reported," may be supported as an authority, if the assertion of the same learned judge, in a later case (Dorsey *v.* Jackman, 1 S. & R. 51), be correct, viz., that it "was determined upon the ground of fraud and imposition." Chief Justice Tilghman, in the case last referred to (p. 48), instanced "fraud or deception," as furnishing an exception to the rule, that money could not be recovered back, and such, according to Judge Yeates (in Steinhauer *v.* Witman, 1 S. & R. 447), is the settled law. See also Mathers *v.* Pearson, 13 S. & R. 258; Landis *v.* Urie, 10 Id. 316; Charles *v.* Scott, 1 Id. 294.

(*b*) Ruston *v.* Dunwoody, 1 Binn. 42; Pollock *v.* Hall, 4 Dall. 222; s. c. 3 Yeates 42; Grubb *v.* Grubb, 2 Dall. 191; s. c. 1 Yeates 193; McCall *v.* Cracssilat, 2 S. & R. 167.

LEVINZ *v.* WILL.

Mortgage.

A mortgage, not recorded within six months, according to the provisions of the act of 1715, is nevertheless, good against the mortgagor.

THIS action was tried at July term, 1788, when, by consent, a verdict was given for the plaintiff, for the sum of 687*l.*, 5*s.*, with six pence costs, subject to the opinion of the court on the following facts:

"The plaintiff executed and acknowledged a mortgage, on the 3d day of September 1782, which was recorded on the 30th of October 1783. The mortgaged premises being sold by the defendant, then sheriff of the city and county of Philadelphia, the balance, after deducting the sum for which the land had been sold, was paid to the mortgagee. Afterwards, to wit, on the 16th of July 1785, the plaintiff made an assignment of all his property for the use of all his creditors, and the assignees bring this action, in his name, to recover the money thus paid over to the mortgagee. If the court shall be of opinion with the defendant, on the foregoing case, then judgment shall be entered for him; otherwise, judgment to stand for the plaintiff for the sum specified in the verdict."

*The question was, whether a mortgage, not recorded within six months, is good against the mortgagor? And it was argued, on the 5th of January 1788, by *Wilson* and *Ingersoll*, for the plaintiff; and *Sergeant* and *Bradford*, for the defendant. [*431

For the *plaintiff*, it was urged, that on account of the notoriety of conveyances at common law, they were not liable to so many frauds as modern alterations in the mode of transferring property tended to introduce. To prevent these, however, several salutary statutes have been made, which, principally, have in view to protect the rights of honest creditors, and *bonâ fide* purchasers. Thus, by the act of assembly (1 Sm. Laws, 94), it is expressly said, that "no deed, or mortgage or defeasible deed, in the nature of mortgages, hereafter to be made, shall be good or sufficient to convey or pass any freehold or inheritance, or to grant any estate therein, for life or years, unless such deed be acknowledged or proved, and recorded within six months after the date thereof, where such lands lie, as herein-before directed for other deeds:" and upon the construction of this clause, the present case depends.

By a subsequent act of assembly, indeed, the neglect or omission to record an absolute conveyance within six months, makes it only void against a subsequent purchaser or mortgagee, for a valuable consideration (1 Sm. Laws, 422); but there was abundant reason to vary the intent and form of the expression, in the two cases; because, on an absolute conveyance, possession accompanies the deed, which does not take place on a mere mortgage; and the object of the legislature was, to prevent a false and delusive color of property. Since, then, the mortgage, for want of being recorded within six months, was not sufficient to convey or pass any estate, the plaintiff, or rather, his creditors, who use his name, are entitled, in this action, to recover the money back from the defendant, that has been paid to him on account of a deed, or instrument, which the law had previously made void and nugatory.

For the *defendant*, it was contended, that, although the letter of the act was against him; the spirit of it, which is the true guide in the construction of laws, was in his favor. It is a general rule, that cases without the letter, if within the mischief, shall have the remedy. 4 Bac. Abr. 648. Nay, words shall sometimes be expounded against the letter, in order to maintain the intent. 19 Vin. 519. 1 Black. Com. 61. Statutes must be expounded by a consideration of the previous law, the mischief complained of, and the remedy provided. Ibid. 512. Now, by the common law, the mortgage would have been good, although not recorded; and the sole reason for calling for a record of the deed, must be to protect subsequent purchasers, since it could be of no consequence to the mortgagor himself. The construction of this very act has, in another respect, been contrary to the letter; for it requires, that the deed shall not only be executed, but acknowledged and recorded; and yet the execution, without the acknowledgment, has always been held sufficiently binding on the party. But the authorities to
*432] this *point are express and numerous. By the statute of 13 *Eliz.*, *c.* 10, all leases by ecclesiastical bodies, for longer terms than three lives, or twenty-one years, are declared "utterly void to all intents and purposes, any law, custom or usage to the contrary thereof notwithstanding;" and yet, as no legislature could mean to make a man's act void against himself, the mischief, which was the impoverishing their successors, has always been deemed sufficiently suppressed, by vacating longer leases, after the death of the grantors, but the leases, during their lives, being not within the mischief, are not within the remedy. 1 Black. Com. 87. Were it otherwise, the grantors would be allowed to do wrong to other persons. 3 Bac. Abr. 390. And every principle that applies in that case, equally applies in the one before the court. By the act of assembly (1 Sm. L. 422), an absolute conveyance, not recorded within six months, is made void against a subsequent purchaser for a valuable consideration; but let us suppose, that such subsequent purchaser had notice of the previous conveyance, it is certain, that he would not be protected by the act, although his case would come fully within the words.(*a*)

Thus, also, the words of the English statute of frauds and perjuries, 29 *Car. II.*, *c.* 3, § 1, are as strong as those in the act now under discussion; and any agreement which is not to be performed within a year from the making thereof, is declared to be invalid, both in law and equity; and yet, if an agreement to lease for a longer term is confessed, in an answer to a bill in chancery, the court will compel the party (though the law has expressly declared the agreement void) to execute the lease. In Cowp. 141–2, is a case within the letter of a rule of the king's bench, respecting warrants of attorney given by persons in custody, and yet, as it was not within the intent, the court refused to consider it within the remedy. But it is clear, that, if the common law could not grant relief, a court of equity would; 2 Eq. Ca. Abr. 684; 1 P. Wms. 279. See 4 & 5 *W. & M.*, *c.* 20. And this court exercises both jurisdictions. Against Levinz, the defendant has a specific lien in equity, though the mortgage had been void (which is denied) at common law; and notwithstanding the action is brought in his name for the use of others, the assignees can be in no better situation than the assignor,

(*a*) Stroud *v.* Lockhart, 4 Dall. 153.

and are bound by the same equity. 1 Chan. Cases, 170. If, indeed, a judgment or mortgage had been obtained by any person, before the sale of the land, and actual payment of the money to the defendant, the preference so obtained at law, would have been conclusive against him; but as the case stands, the court will do justice and support right. If a father conveys to a child, for love and affection, though this will not be good as a bargain and sale, it is good in equity as a covenant to stand seised to uses. 3 Eq. Ca. Abr. 482, pl. 19. See, how far a deed operates against the maker; 4 Burr. 2209. And the relief in cases of defective titles; Gilb. For. Rom. 228; 1 Eq. Ca. Abr. 357, 385.

*For the *plaintiff*, in reply, it was observed, that the arguments of the adverse counsel proved the imperfection of human language; for never were words more definite, more clear, than those in question, and yet, it is contended, that they do not express the intention of the legislature that used them. Two general positions, however, are to be discussed: 1st, Whether a mortgage not recorded within six months is absolutely void? and 2d, Whether the creditors can take any advantage which the defendant himself could not? But we trust that the decision of the first will be so plain, that it is hardly necessary to consider the second. [*433

1. The cases cited from 4 Bac. Abr., and 19 Vin., contain nothing but general observations, that where the meaning of the legislature is evidently different from the letter of the act, the latter shall be construed agreeable to the former: and this it is not intended to deny. But we contend, that the legislature had in view the protection and interest of creditors, as well as subsequent purchasers; to prevent frauds upon those, as well as to secure the rights of these; and there is no just reason for giving the one class a superiority over the other, since all the bankrupt acts, by which the present act may in this respect be explained, are made to prevent a false appearance of property, by which men may be induced to give credit, as well as to purchase an estate.

There must be some force given to all the words of the legislature, as well as to the words of a deed; and as the words vary in the two acts (1 State Laws, 79 and 520), we must presume there was an intentional variation of the meaning. The case from Black. Com., on the 13 *Eliz.*, *c.* 10, shows that the statute was made for the benefit only of the successors of ecclesiastical bodies; and had no respect to the party himself or to his creditors. But we will meet them on the statute of frauds and perjuries, from which they have argued by analogy; for are not leases for more than three years void? It is said, that if an agreement to lease for more than three years is confessed in an answer, the chancellor, if money has been received, will compel a performance: though we do not admit this doctrine, it does not affect the present argument, which turns upon the validity of a mortgage actually executed. A deed of bargain and sale, not enrolled, is void. 1 Danv. Abr. 696; 2 Vern. 564. The case from Cowper, was that of an attempt to commit a fraud, which vitiates every transaction.

But we still insist, that where the letter is plain, the court cannot construe it differently (1 Term Rep. 101). It would, indeed, be the assumption of a dispensing power, if the judges could give relief against a positive act.

Property is the foundation of credit; and hence, with an admirable

independence of the prejudices in favor of English jurisprudence, one of the first acts of this province recognised it as such; so that, by the silent operation of the law for taking real estate in execution, the whole is, in fact, mortgaged to creditors, in case of the death of the possessor. But where a mortgage is actually executed, *in Pennsylvania, the mortgagor re- *434] mains in possession, although the legal title is in the mortgagee; and hence the necessity for the precautions required by the act of assembly. The statute of enrollments, 27 *Hen. VIII.*, *c.* 16, has the same expression; and the construction under the statute is, that deeds of bargain and sale have no operation to transfer the estate, until they are enrolled; but when that is done, the deeds operate *ab initio*, by relation, as in the case of letters of administration, or assignments under commissions of bankrupts; and that, as Lord Coke says, by the words of the statute. 2 Inst. 647. But the words of the act of Pennsylvania are in the negative, that no interest shall pass; and therefore, although the deed may have the effect of a covenant, and be, in many other respects, obligatory on the person of the mortgagor, it cannot convey any interest in the land, unless duly recorded.

II. But, to notice the second proposition, whether the assignee can derive an advantage to which the assignor would not be entitled, it is clear, that the latter may sue his debtor for the benefit of the former: 1 Term Rep. 619. And although, generally speaking, the assignor and assignee must stand on the same footing; yet, as in the case of an innocent purchaser, without notice of a previous conveyance, so in the case of an honest creditor, deluded by a fictitious appearance of property, there may be circumstances which place him in a more favorable point of view.

Neither, upon the whole, is there any ground to complain of hardship; for the legislature, considering the situation of the country, gave ample time for recording deeds, that had been neglected, by the act of the 23d of September 1783. (2 Sm. L. 79.) And the universal understanding upon this subject has been, that a mortgage is absolutely void, to all intents and purposes, if not recorded within the six months prescribed by the law.

The cause having been for some time under advisement, the chief justice delivered the opinion of the court as follows:

McKean, Chief Justice.—The judgment in this case depends upon the construction of the acts of assembly. 1 State Laws, pages 79 and 520.

It is to be premised, that the reason which induced the legislature to make such acts as take away the common law, may be, and usually is, urged, as the rule by which the acts ought to be construed. In doubtful cases, therefore, we may enlarge the construction of an act of assembly, according to the reason and sense of the law-makers, either expressed in other parts of the act itself, or guessed, by considering the frame and design of the whole. *Archer* v. *Bokenham*, 11 Mod. 161. And the original intent and meaning is to be observed. *Magdalen College Case*, 11 Co. 73. Where, indeed, the expressions of an act of assembly are in general terms, they are to receive a construction that may be agreeable to the rules of common law, in cases of a similar nature. 19 Vin. Abr. 512.

*The original intent, then, of the makers of the law immediately *435] under consideration, and their principal reason, seems to have been, to prevent honest purchasers or mortgagees of real estates, from being

deceived by prior secret conveyances or incumbrances; and therefore, they have directed that such conveyances or incumbrances shall be recorded in six months, or that they should not be sufficient to pass any estate. Thus, by having recourse to the offices of the recorders, any one may ascertain the previous liens upon the property which he wishes to purchase, or to receive as a pledge; and this amounts to a constructive notice to all men, and supersedes the necessity of express personal notice. But the legislature did not mean, nor have they, in fact, enacted, that express personal notice, where given, should have no effect; neither could they entertain an idea of defeating fair and honest bargains, which do not injure other persons: and if this unrecorded deed can be obligatory in no other manner, it may certainly operate as a covenant to stand seised to uses. 2 Wils. 72, 105.(*a*)

But why should it not be good as between John Levinz and the grantee, since by construing it so, no one else can be hurt, and the deed was clearly delivered for securing a just debt, without any suggestion of fraud in the transaction? It is true, it would not have been valid against a subsequent grantee or mortgagee, whose deed or mortgage was regularly recorded; but we think it is efficient against John Levinz, and all other persons; that the deed, so far, is sufficient to pass the lands, and that, under it, the possession of the premises might have been recovered in an ejectment.

There is a great variety of cases which confirm this opinion, and some of them have been already cited by the defendant's counsel. Thus, with respect to church leases, the statute enacts, that they may be made for twenty-one years, or three lives, from the date; and if made for a longer term, that they shall be utterly void, any law, custom or usage to the contrary. And yet leases for a longer term have always been adjudged good against those who made them; because that could do no wrong to the successors, or to any other persons. See 1 *Eliz.*, *c.* 10. § 5; 3 Bac. Abr. 390; Cowp. 141. So, likewise, notice of a judgment, though not docketed, will bind a purchaser, notwithstanding the express words of the statute of 4 & 5 *Wm. & Mary*, *c.* 20, § 3, by which it is declared, that judgments, not docketed, shall not affect lands, as to purchasers or mortgagees. 2 Eq. Abr. 684. In the case of a lease made in Ireland, where there is a statute providing, that all leases which were not registered by a certain day, should be void, if a subsequent lessee had notice of the prior lease, though not registered, it shall be good against him. 2 Eq. Abr. 282, ca. 19. And in the instance of a surrender of a copyhold, by way of mortgage, not presented to the court in time, the surrender will nevertheless be valid against voluntary dispositions, or creditors; and that, although by the custom of the manor, confirmed by the act of parliament, all such surrenders were to be void, if not presented in twelve *months after they were made. 1 Chan. Ca. 170; 2 Vern. 564. These indeed, were considered in the nature of purchasers by defective conveyance, and the law as a penal one. See also, 1 Will. 279. [*436

Upon the whole, the court are clearly of opinion with the defendant, and direct judgment to be entered accordingly.

Judgment for the defendant.(*b*)

(*a*) See the remarks of Judge DUNCAN, in Semple *v.* Burd, 7 S. & R. 291.

(*b*) See the remarks upon this case, by Judge SMITH, in Burke *v.* Allen, 3 Yeates 60;

Quesnel *v.* Mussi.

Privilege of freeholder.

A judgment before a justice is sufficient to defeat the privilege of a freeholder.

The defendant being sued by a *capias* in this action, *Heatly* obtained a rule to show cause why the writ should not be quashed, upon proof that the defendant was a freeholder.

Ingersoll and *Du Ponceau* opposed the rule, and produced the records of two judgments which had been obtained against the defendant before a justice of the peace, &c.

By the Court.—This is a sufficient ground to defeat the privilege of a freeholder.

Let the rule be discharged.

Parker *et al.* *v.* Wood.

Purchaser with notice.

A mortgage, acknowledged before, and recorded by, officers whose commissions had become void by the declaration of independence, was *held* to be good against a subsequent judgment-creditor, and purchaser under a sheriff's sale, who had had notice of the mortgage.

Scire Facias on a mortgage of lands in Northampton county. The cause was tried at Easton, when a verdict was taken for the plaintiff, subject to the opinion of the court on the following case:

"That the defendant, Wood, on the 20th of June 1776, made and executed the mortgage deed in the record set forth; and on the 5th day of July 1776, acknowledged the same before Peter Kuchlien, Esquire, then holding a commission as one of the judges of the court of common pleas, for the county of Northampton, from John Penn, Esquire, late governor of the province of Pennsylvania; but he had not received any such commission, after the declaration of independence, nor any notice of that declaration. That the said mortgage was, afterwards, to wit, on the 3d day of November 1776, recorded by Lewis Gordon, Esquire, in the record-book kept for recording deeds and mortgages, in the said county, he, the said Lewis, at the declaration of independence, being recorder of deeds in and for the said county, and continuing, as such, to do and perform the duties of the said office, until the said 3d day of November, and after; but he had received no commission for so doing, after the 4th day of July 1776.

"That the said mortgaged premises were afterwards taken in execution, set up to sale, and sold by the sheriff of the said county to G. A. Baker, under certain conditions, and at the time of the *deed from the sheriff to the said G. A. Baker, an agreement was made relative to the premises, in case the said mortgage should be adjudged to be valid. That the defendant, Jacob Wood, at the time of the said purchase made by G. A. Baker, was indebted to the said G. A. Baker, by judgment entered in the common pleas of the said county, prior to the aforesaid sale

*437]

---

and see Parker *v.* Wood, *post*, p. 436; Stroud *v.* Lockhart, 4 Dall. 153; Semple *v.* Burd, 7 S. & R. 286; Geiss *v.* Odenheimer, 4 Yeates 279; Wilt *v.* Franklin, 1 Binn. 522.

by the sheriff, and to the plaintiff's judgment against the defendant. And that G. A. Baker knew of the said mortgage before the contracting of the said debt. If, upon the whole matter, the court shall be of opinion, that the law is with the plaintiff, then judgment to be entered for him; otherwise judgment to be for the defendant as in the case of a nonsuit."

The question was, whether a mortgage, acknowledged before a justice of the common pleas, and recorded by the recorder of the proper county, subsequently to the declaration of independence, was void?—the justice and the recorder having no other commissions than those which they had respectively received from the late governor of the province, previously to such declaration.

The case was argued in January term last, by *Bradford*, for the plaintiff, and *Biddle* and *Ingersoll*, for the defendant.

For the *plaintiff*, it was urged, that although the statute of 4 & 5 *Wm. & M.*, *c.* 20, enacts that, unless a judgment is docketed, it shall not affect purchasers; yet, judgments have been held good, in a variety of cases, contrary to the letter of the act. 2 Eq. Ca. Abr. 684. And equity will supply a defect in a mortgage. 1 Eq. Ca. Abr. 320. The authorities cited in *Levinz* v. *Will*, *ante*, p. 430, on the point of notice, are equally applicable here; and, even if the justice would have no authority to take the acknowledgment of the deed, after notice of the declaration of independence, the want of such notice is sufficient to justify him. Besides, during the same period, a considerable number of deeds were recorded (which was proved by the recorder of deeds for the city and county of Philadelphia so as to render it necessary, at least, to apply the maxim of *communis error facit jus*, to cases of this description. *Lloyd* v. *Taylor*, *ante*, p. 17. The mortgage, according to common acceptation, was duly acknowledged and recorded, and, as the record of a mortgage could only be required to give a constructive notice to subsequent purchasers, the spirit and meaning of the law is satisfied, by the actual notice which G. A. Baker had of the deed. See 2 Eq. Ca. Abr. 482.

For the *defendant*, it was contended that, in strict law, the acknowledgment and recording before officers whose commissions were expired, did not make a valid acknowledgment and recording of the mortgage; so that by the act of assembly (1 Sm. L. 94), the mortgage was absolutely void: and that, in point of equity, as the mortgage might have been recorded in the proper office, after the 14th of March 1777, the plaintiff had neglected a fair opportunity of giving legal notice of his lien, for want of which the defendant had been induced to lend his money, and that, therefore, *the plaintiff, and not the innocent purchaser, ought to suffer; for a judgment-creditor is within the equity of the rule in favor of purchasers. 19 Vin. When, indeed, it is impracticable to comply fully with a law, the compliance should be as near as possible; and, from the act passed on the 23d of September 1783, the legislature evidently considers acts done by officers under the provincial government to be void; for, at the same time that provision is made for enlarging the time of recording mortgages, executed between the 1st of January 1776, and the 18th of June 1778 (which was the case of the mortgage in question), there is a positive reservation in favor of judgments and other liens, obtained during the intermediate period, and before [*438

the record was actually made (2 Sm. Laws, 79). But this more conclusively appears from the acts of the 28th of January 1777, and the 31st of August 1778, when all officers (with some specific exceptions) under the former government are totally disqualified, and considered as having been incapable of discharging the functions of their respective offices. See 1 State Laws, 3, 137.

After the court had held the case for some days under advisement, the chief justice delivered their opinion to the following effect:

McKean, Chief Justice.—The decision of the court is, unanimously, in favor of the plaintiff; and the reasons of the decision I will briefly recapitulate.

1st. Because the legislature declared by an act of the 28th of January 1777, that all acts of assembly passed before the 14th of May 1776, ceased to have any obligatory operation from that day, until the 10th of February 1777; and, consequently, there was no law which required mortgages to be recorded during that period.

2d. Because the mortgagee did all he could to give constructive notice of the mortgage, by having it copied into the book in which deeds and mortgages had been before recorded, and by the former officer; of which too the defendant's subsequent judgment-creditor and purchaser at the sheriff's sale, had previous notice.

3d. Because it appears from the evidence of the recorder of deeds that, for the city and county of Philadelphia only, there had been three hundred deeds, fifty-two mortgages, and four assignments, copied in the same manner into the books of his office, during the above-mentioned period of nine months, from May 1776, to the 10th of February 1777; and as there is no doubt that many instruments are in a similar predicament in every county of the state, the maxim of "*communis error facit jus*," strongly applies to the present case.

And 4th. Because all transactions in the land-office, and other offices, during the *interregnum*, which were in themselves fair and honest, have uniformly been considered as valid, for the sake of public convenience.

Judgment for the plaintiff.(*a*)

(*a*) See Levinz *v.* Will, *ante*, p. 430; and the remarks of Judge Duncan, in Semple *v.* Burd, 4 S. & R. 291.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

JUNE TERM, 1789.

HOLMES *v.* COMEGYS.

Witness.—Confidential communications.

The confidential agent or factor of a party is not privileged from giving testimony.

THIS was a *scire facias* against the garnishee in a foreign attachment, upon the trial of which, the confidental agent or factor of the original defendants, who was casually attending in court, was offered as a witness, to prove effects in the hands of the garnishee.

Levy, objected to the admission of the witness; and contended, that he ought not to be allowed, or, at least, compelled, to give evidence of matters confidentially communicated to him as an agent; and that the court had then no power over him as a witness, because he had not been *subpœnaed* to attend. But by—

SHIPPEN, President.—It would be of very dangerous consequence, if it was established, that a commercial agent was not amenable as a witness in a court of justice, in a cause against his constituent. It is straining the matter of privilege too far. And if the law makes him a witness, we are too fond of getting at the truth, to permit him to excuse himself from declaring it, because he conceives, that, in point of delicacy, it would be a breach of confidence.

BY THE COURT.—Let the witness be affirmed.(*a*)

PHILLIPS *v.* HYDE.

Verdict on replevin-bond.

DEBT upon a replevin-bond, after judgment *de retorno habendo* in the replevin, and thereupon, a return of *elongatur*.

Sergeant, on the trial of the cause, offered witnesses to prove, that the

---

(*a*) See Morris *v.* Vanderen, *ante*, p. 64.

goods had been tendered to the plaintiff; and therefore, that the condition of the replevin-bond had been performed.

*440] *Levy*, opposed the admission of this testimony, and contended, that no evidence could be received to contradict the sheriff's return. See 12 Mod. 424; T. Raym. 485, 7; 2 Mod. 10, 11; Cro. Eliz. 872, pl. 9.

Sergeant, in reply, admitted, that some returns of the sheriff could not be traversed; but he contended, that the return of *elongatur* was not of that class. See 12 Mod. 426.

The Court overruled the evidence.(*a*)

A question then arose, whether the jury could include the costs which had accrued on the replevin, in their verdict in the present action. And the Court were clearly of opinion, that they could, and ought to do so.(*b*)

Conformable to which was the verdict of the jury.

Adams *v.* La Comb.

Distress.

The goods of a *stranger* can be distrained for rent, only while on the premises.[1]

Replevin. The material question, on the trial of this cause, was, whether the goods of a stranger, being removed from the premises, before a distress, could be pursued and seized, within the thirty days which the act of assembly allows for pursuing and seizing the goods of the tenant? (See 1 Sm. L. 370.)

Shippen, President, in the charge to the jury, delivered it as the clear opinion of the court, that the right of pursuing and seizing goods, after their removal, was confined to the goods of the lessee, from whom the rent was really due; and that the goods of a stranger could only be distrained, while they were on the premises.(*c*)

(*a*) See Shewell *v.* Fell, 3 Yeates 17; 4 Id. 47.

(*b*) *Sergeant* having suggested, that both the points in this case had been otherwise determined in a case of Jackson *v.* Webb, Mr. President Shippen said, that the matter was there left, upon equitable circumstances, to the court.

(*c*) See Gracevel *v.* Shiy, 12 S. & R. 217; Hobbs *v.* Geiss, 13 Id. 417; Waters *v.* McClellan, 4 Dall. 208.

[1] Scott *v.* McEwen, 2 Phila. 176; Sleeper *v.* Parrish, 7 Id. 247.

SUPREME COURT OF PENNSYLVANIA.

SEPTEMBER TERM, 1789.

McCullough, assignee, *v.* Houston.

Promissory note.

***Held*, that the indorsee of a note took it subject to all equitable considerations, existing between the payee and the maker.**

This was an action brought by Hugh McCullongh, as assignee of Samuel Young, upon a promissory note made by John H. Houston; and on the trial of the cause, a verdict was given for the plaintiff, subject to the opinion of the court on the following point:

"Whether the indorsee of a promissory note takes it subject to all equitable considerations, to which it was subject in the hands of the indorser, the original payee?" And if the opinion of the court was in favor of the defendant, a new trial was to be awarded.

The point was argued at the last term, before all the judges, by *Sergeant*, for the plaintiff, and *Ingersoll*, for the defendant.

For the *plaintiff*, it was observed, that in the act of assembly, making bonds and notes negotiable, there is no provision enabling the promisee, or drawee, to bring an action on the note itself (1 Sm. Laws 90); that such an action did not lie at common law; and consequently, that wherever it had been brought in Pennsylvania (which is in numerous instances), the proceeding must have been founded on the statute of 3 & 4 *Ann.*, *c.* 9, and the law of merchants. That statute, therefore, must be considered as extended in practice to this country, before the revolution; and a legislative sanction is given to the practice, by the act of assembly, which declares, that such parts of the statute law of England, as were heretofore in force, shall still be binding in Pennsylvania. 2 State Laws, 3.[1] On the assignment itself the assignee cannot bring an action against *the assignor; but he may [*442 bring covenant, or, perhaps, an action for money had and received, &c. 2 Lord Raym. 1242, 1419. But in respect to notes, a blank indorsement passes, as if payable to bearer; and every part of the statutes of *William* and *Anne*, for giving negotiability to bills of exchange and notes of hand, has been introduced into this province, from the earliest times.

[1] Act 28th January 1777.

For the *defendant*, it was urged, that at common law, bonds and notes were mere *choses in action*, and the assignee took them under all the equitable circumstances to which they were liable in the hands of the assignor. That promissory notes do not come within the law of merchants is clear; for if they did, the statute of *Anne* would have been unnecessary. The question, therefore, is, whether that statute has been extended to Pennsylvania? or, whether, by our act of assembly, notes are put on the same footing with bills of exchange?

From the general rule of the extension of statutes, the 3 & 4 *Ann.* has not been extended; because it was passed subsequently, to the settlement of Pennsylvania; because the province is not particularly named in it, nor would it, indeed, have been the policy of the British legislature to promote the circulation of our paper credit; and because it has not been recognised and adopted by any positive act of assembly. With respect to the introduction of the statute by practice, it operates no further than this, that the payee of a promissory note has brought an action on the note against the signer, before our act of assembly was passed; but until then, the indorsee could not maintain such an action; and obligations and promissory notes, are put on the same footing.

With respect to the act itself, that the legislature could not intend to put promissory notes upon the same footing with bills of exchange, appears evidently from this consideration, that the preceding part of the act pursues the statute of *Anne*, nearly *verbatim;* but when it comes to that clause in the latter, which places notes on the same footing with bills of exchange the act equally varies its spirit and expression: and, it is declared, that the assignee of a note, &c., shall recover so much thereof as shall appear to be due at the time of the assignment, in like manner as the assignor could have done.

The chief justice now delivered the opinion of the court, in the following manner:

McKean, Chief Justice.—In pronouncing the opinion of the court, on the point reserved for their consideration, I shall premise, that bonds and promissory notes in writing stood on the same footing, at common law; and that the assignment of those instruments, as well as the form, operation and effect of such assignment, depends entirely upon the municipal law of the place where it is made.

By an act of assembly of Pennsylvania, passed on the 28th day of May 1715, entitled "An act for the assigning of bonds, specialties and promissory notes," it is recited in the preamble, "that it hath *been held, that *443] bonds and specialties, under hand and seal, and notes in writing, signed by the party who makes the same, whereby such party is obliged, or promises to pay unto any other person, or his order, or assigns, any sum of money therein mentioned, are not by law assignable or indorsible over to any person, so as that the person to whom the said bonds, specialties, note or notes, is or are assigned or indorsed, may, in their own names, by action at law, or otherwise, recover the same," &c. (1 Sm. Laws 90.)

This, then, is conclusive as to the operation or effect of the assignment of a bond, or the indorsement of a note, previously to the passing of the

act; for no assignment or indorsement could take place by law, though it might in equity; and the assignee or indorsee could not, in any case, sue in his own name. The act, however, afterwards provides for such assignment and indorsement *toties quoties:* it also declares, that the person or persons to whom the assignment or indorsement is made, may in his, her or their name or names, sue at law, "for the recovery of the money mentioned in the bond, specialty or note, or so much thereof as shall appear to be due at the time of the assignment, in like manner as the person or persons to whom the same was or were made payable, might or could have done;" and that "the assignors shall not, after the assignment, have power to release any of the debts or sums of money really due by the said bonds, specialties or notes."

The question before the court must be decided upon a just construction of the parts of the act of assembly, to which I have just referred. Throughout the whole of this act, bonds and promissory notes are placed exactly on the same footing; except, indeed, that bonds and specialties are to be assigned under hand and seal, and in the presence of two or more credible witnesses. How, then, can the court make any distinction or difference between assignees of the one, and indorsees of the other? They certainly may both sue in their own names, and respectively recover the money mentioned in the bonds or notes, assigned or indorsed, or so much thereof as shall be really due thereon, or in like manner as the obligees or payees could have done; but, surely, this seems to be equally clear, that neither can recover more than what was really due at the time of the assignment or indorsement; in other words, no more than the original payees could have done, prior to the transfer.

Before this act was passed, it appears, that actions by the payee of a promissory note were not maintained, nor can they since be maintained, otherwise than by extending the English statute of 3 & 4 *Ann.*, *c.* 9, § 1. Actions upon promissory notes were probably brought here, soon after the passing of the statute, by attorneys who came from England, and were accustomed to the forms of practice in that kingdom, but did not, perhaps, nicely attend to the discrimination with regard to the extension or adoption of statutes. *I have no doubt, indeed, that many [*444
acts of parliament, passed, not only before, but subsequent to the union of England and Scotland, have, by the same means, been introduced and practised upon in Pennsylvania; and as experience has proved such proceedings to be beneficial, so constant and uninterrupted usage has given them a legal existence, that cannot now be shaken or destroyed. But the indorsees of promissory notes, according to the best information which we can obtain, have never grounded their actions against the maker, upon any other basis than the act of assembly, now under consideration; though I think, the action by an indorsee against the indorser, must be founded on the statute of *Anne*, and the usage under it, as no such action is given by the act.

The question, so far as it relates to the assignees of bonds, has been determined in the affirmative, in the supreme court of Pennsylvania, before the revolution. See *Wheeler* v. *Hughes*, *ante*, p. 23. And as, on the one hand, the legislature has made no difference whatever between the assignees of bonds, and the indorsees of notes, so, on the other, we cannot discover

any solid or good reason to introduce a distinction in the particular case before us.

Upon the whole, we are unanimously of opinion, that the indorsee of a promissory note does take it, subject to all equitable considerations to which the same was subject in the hands of the indorser, the original payee. And, therefore,

Let the defendant have a new trial.(*a*)

CUMMINGS, assignee, *v.* LYNN.

Assignment of bond.

Under the act of 1715, the assignee of one holding the *equitable* interest in a bond, cannot sue in his own name.

The assignor of a bond is not liable to the assignee, on the failure of the obligor to pay, where there is no special covenant for that purpose.

THIS was an action of covenant, and the circumstances under which it came before the court, were these: The plaintiff filed a declaration to the following words:

"Joseph Lynn, late of the county of Philadelphia, yeoman, was summoned to answer James Cummings, assignee of James Campbell and Stephen Kingston, who were assignees of George Turner, of a plea that he hold with him the covenants and agreements of him the said Joseph, with the said George made, according to the force, form and effect of a certain deed thereof by him the said Joseph, with the said George made, &c. And thereupon, the said James Cummings saith, that on the 6th day of February, in the year of

---

(*a*) See Stille *v.* Lynch, 2 Dall. 194. Subsequently to the decision of McCullough *v.* Houston, an act was passed to render notes negotiable, dated in the city or county of Philadelphia, and containing the words "without defalcation," &c. (3 Sm. L. 278). And notes or bills discounted at the bank of Pennsylvania were placed on the footing of foreign bills of exchange (except as to damages), by an act passed the 30th March 1793 (3 Sm. L. 97). It is not to be disguised, however, that the authority of McCullough *v.* Houston, has often been doubted in the argument of counsel, and sometimes shaken by the opinion of the court. In Ludlow *v.* Bingham, in the high court of errors and appeals, July sessions 1799, 4 Dall. 47, Mr. SHIPPEN, the present chief justice and Mr. ADDISON, then the president of a circuit of courts of common pleas, declared, that a note "expressed in commercial form, was negotiable upon commercial principles," notwithstanding the case of McCullough *v.* Houston, and independently of the act of assembly. In Gray *v.* Sutton, 8 S. & R. 483, C. J. TILGHMAN said of this case, that although it has not been denied for law, yet it certainly has not been generally approved of." Afterwards, in Lewis *v.* Reeder, 9 S. & R. 197, and Ridgway *v.* Farmers' Bank, 12 Id. 265, a similar opinion was expressed of this case, by the same learned judge. And see Cromwell *v.* Arrott, 1 S. & R. 180; Harrisburg Bank *v.* Meyer, 6 Id. 537; Lighty *v.* Brenner, 14 Id. 127; Humphreys *v.* Blight, 4 Dall. 370; s. c. 1 W. C. C. 44; Evans *v.* Smith, 4 Binn. 66.[1]

[1] The case of McCullough *v.* Houston, after having been frequently questioned as sound law, was formally overruled, in Bullock *v.* Wilcox, 7 Watts 328, where it was decided, that the *bonâ fide* holder for value, and without notice, of a negotiable note, payable to A. or bearer, is entitled to recover on it, against the maker, free from all subsisting equities between the original parties, on a review of all the authorities, by Judge KENNEDY. And see Smith *v.* Hogeland, 78 Penn. St. 252.

our Lord, one thousand seven hundred and eighty-four, at the county aforesaid, a certa.n Nicholas Eveleigh, of the state of South Carolina, by his certain obligation or writing obligatory, sealed with his seal, and to the court here shown, whose date is the day and year aforesaid, acknowledged himself to be held and firmly bound unto a certain Lewis Lesterjette, in the sum of three hundred and sixty-four pounds, twelve shillings, sterling money, in gold or silver specie, at the rate of four shillings and eight pence to the dollar, or one pound, one shilling and nine pence to the guinea, to be paid to the said Lewis, his certain *attorney, executors, administrators and assigns, [*445 when he should afterwards be thereto required. And the said James Cummings in fact saith, that the same sum of money, or any part thereof, being in no wise paid or satisfied, a certain Joseph Parker, for whose use and benefit the obligation or writing obligatory aforesaid was made as aforesaid, afterwards, to wit, on the twelfth day of May, in the year of our Lord, 1784, at the county aforesaid, by his certain deed of assignment, on the obligation or writing obligatory aforesaid, under his hand and seal, duly made and executed, before two credible witnesses, did assign, indorse and make over the obligation or writing obligatory aforesaid, to the said Joseph Lynn, as by the same deed of assignment, to the court here shown, appears. And the said James Cummings further in fact saith, that the said Joseph Lynn, afterwards, to wit, on the 8th day of September, in the year last aforesaid, at the county aforesaid, the said sum of money, or any part thereof, being in no wise paid or satisfied, by his certain deed of assignment, on the said writing obligatory, under his hand and seal, duly made and executed, before two credible witnesses, did assign, indorse and make over the said obligation or writing obligatory, to the said George Turner, for value received of him. And the said James Cummings further in fact saith, that the said Joseph Lynn, in and by his said deed of assignment, did covenant and agree to and with the said George Turner and his assigns, that the sum of money aforesaid should be well and truly paid to the said George Turner, or his assigns, agreeable to the said obligation or writing obligatory, as by the same deed of assignment, to the court here shown, appears. And the said James Cum-, mings further in fact saith, that the said George Turner, afterwards, to wit, on the 18th day of November, in the year last aforesaid, at the county aforesaid, the said sum of money being in no wise paid or satisfied, did, by his certain deed of assignment, on the said obligation or writing obligatory, duly made and executed, under his hand and seal, before two credible witnesses, assign, indorse and make over the said obligation or writing obligatory to the said James Campbell and Stephen Kingston, and their assigns, for value received of them, and by the same deed of assignment, the said George did then and there covenant with the said James Campbell and Stephen Kingston, and their assigns, that the said sum of money should be well and truly paid to the said James Campbell and Stephen Kingston, or their assigns, agreeable to the said obligation or writing obligatory, as by the same deed of assignment, to the court here shown, appears. And the said James Cummings further in fact saith, that the said James Campbell and Stephen Kingston, afterwards, to wit, on the eighteenth day of December, in the year last aforesaid, at the county aforesaid, the said sum of money being in no wise paid or satisfied, by their certain deed of assignment, on the said obligation or writing obligatory, duly made and executed, under their hands

and seals, before two credible *witnesses, did assign, indorse and make over the obligation or writing obligatory to the said James Cummings, and by the same deed of assignment, the said James Campbell and Stephen Kingston did then and there covenant with the said James Cummings, that the said sum of money should be well and truly paid to the said James Cummings, agreeable to the said obligation or writing obligatory, as by the same deed of assignment, to the court here shown, appears. Yet the said Nicholas Eveleigh, or the said Joseph Parker, or the said Joseph Lynn, or the said George Turner, or the said James Campbell, or Stephen Kingston, the sum of money aforesaid, or any part thereof, to the said James Cummings, although often required, hath not paid; by reason whereof, action hath accrued to the said James Cummings, to demand and have the said sum of money of and from the said Joseph Lynn: nevertheless, the said Joseph Lynn, the same sum of money, or any part thereof, to the said James Cummings, hath not paid, although, to do this, the said Joseph Lynn, afterwards, to wit, on the 19th day of the same month of December, in the year last aforesaid, at the county aforesaid, was, by the said James Cummings required, but the same to him to pay hath hitherto refused, and still doth refuse; to the damage of the said James Cummings, one thousand pounds, lawful money of the state of Pennsylvania; and thereof he bringeth suit, &c."

The defendant craved *oyer* of the bond, condition and assignments stated in the declaration, which was given in the following words:

"*South Carolina.*

"KNOW ALL MEN, by these presents, that I, Nicholas Eveleigh, of the said state, planter, am held and firmly bound unto Lewis Lestarjette, merchant, in the full and just sum of three hundred and sixty-four pounds, twelve shillings, sterling money, in gold or silver specie, at the rate of four shillings and eight pence to the dollar, or one pound, one shilling and nine pence to the guinea, to be paid unto the said Lewis Lestarjette, his certain attorney, executors, administrators or assigns: to which payment well and truly to be made and done, I bind myself, and each and every of my heirs, executors and administrators, firmly by these presents: sealed with my hand, and dated the sixth day of February, in the year of our Lord, one thousand seven hundred and eighty-four."

"THE CONDITION of the above obligation is such, that if the above-bound Nicholas Eveleigh, his heirs, executors or administrators, shall and do well and truly pay, or cause to be paid, unto the above named Lewis Lestarjette, his certain attorney, executors, administrators or assigns, the full and just sum of one hundred and eighty-two pounds, six shillings, sterling money, in gold and silver specie, at the rate of four shillings and eight pence to
*447] the *dollar, or one pound, one shilling and nine pence to the guinea, with interest from the date hereof, on or before the first day of January, which will be in the year of our Lord, one thousand seven hundred and eighty-five, without fraud or further delay, then the above obligation to be void and of non-effect, or else to remain in full force and virtue.

Sealed and delivered in the presence of
JOHN MCQUEEN.

N EVELEIGH." (L. S.)

"N. B.—This bond is a renewal of an old debt contracted by Col. N Eveleigh, to Mr. Jos. Parker, for the above amount, in the year 1780.

L. LESTARJETTE."

"I do hereby assign all my right, title, claim, property and demand of the within bond to Joseph Lynn, of the city of Philadelphia, merchant, for his sole use and benefit, for value received, 12th May 1784.

Witness. JOS. PARKER." (L. S.)

CROPELY ROSE,
ALEXANDER MAJOR.

"I do hereby assign, at the request, and with the consent of the above-signed Joseph Parker, all my right, title, claim, property and demand, of, in and to the within bond, to George Turner, of Philadelphia, for his sole use and benefit. Value received of him, this twenty-eighth day of September 1784.

Witness. JOSEPH LYNN." (L. S.)

JACOB BAKER,
CAD. MORRIS.

"I do hereby assign all my right, title, claim, property and demand of, in and to the within bond, to Messrs. James Campbell and Stephen Kingston, of Philadelphia, merchants, for their joint use and benefit. Value of them received, this eighteenth day of November 1784.

Witness. G. TURNER." (L. S.)

ALEXANDER MAJOR,
HENRY M. VAN SLINGEN.

'WE do hereby assign all our right, title, claim, interest, property and demand, of, in and to the within bond, to James Cummings, of Charleston, merchant, for his use and benefit. Value received in account with him, Philadelphia, 18th December 1784.

Witness. JAMES CAMPBELL. (L. S.)
STEPHEN KINGSTON." (L. S.)

JAMES RANKIN,
ALEXANDER MAJOR.

*Upon this, the defendant demurred, for the variance between the covenants stated and assigned in the declaration, and the covenants appearing upon *oyer* of the bond, condition and assignments: and upon a joinder in demurrer, the question was brought before the court, whether this action of *covenant* could be maintained on Lynn's assignment? which was argued at the last term, by *Tilghman* and *Sergeant*, for the defendant, and *Lewis* and *Ingersoll*, for the plaintiff. [*448

For the *defendant* it was contended, in support of the demurrer, that the assignment by Parker was not within the act of assembly (1 Sm. Laws 90), for Lestarjette was the legal obligee, and Parker only the obligee in interest; and as no suit could have been maintained in Parker's name, arguments drawn from the act cannot apply to support the present action, but the assignment must be considered as made at common law.

That although Turner might have sued Lynn, yet, as it was only an equitable assignment, which is the case in respect to all *choses in action*, where positive law does not interpose, Turner's assignee could not support

such an action. 2 Ves. 181 ; 1 P. Wms. 252 ; 2 W. Black. 1140 ; Cro. Jac. 179. The assignment is only an authority to receive the money ; or, at most, a covenant, that, if Lynn received it, he would pay it to his assignee. There is nothing like an express covenant on the part of Lynn ; though, relying on the word assigned, it will, perhaps, be contended, that there is an implied covenant. But that (as it is already observed) is only an authority to receive the money ; and the assignor can be guilty of no breach, unless he interferes with the recovery of his assignee. 1 Ld. Raym. 633 ; 3 Keb. 304; 2 Ld. Raym. 1242 ; 12 Mod. 553 ; 1 Id. 113. The law, indeed, will make a covenant, where a man contravenes his agreement, by deed under hand and seal. See 11 Mod. 171 ; Cro. Eliz. 157. But no action of covenant has ever been brought, in England, by the assignee of a bond, against the assignor ; which furnishes a strong argument that no such action will lie. 1 Ld. Raym. 683 ; 12 Mod. 553. And there has been no judgment of any court in Pennsylvania upon this point. The law is clear with respect to chattels in possession, that then an express warranty is necessary. 2 Salk. 210 ; 1 Str. 459. See Bull. N. P. 272. Promissory notes are assignable to this effect, by positive statute ; for, at common law, the indorsee could not sue the indorser, in his own name. (See 1 Sm. Laws, 90.)

That, at least, due diligence ought to have been used to obtain the money from the obligor, as in the case of bills of exchange or promissory notes, where a *demand* should not only be proved, but alleged, or it would be fatal on a writ of error. See Doug. 679. In the present case, no action was ever brought, nor any other attempt alleged to have been made, for the recovery of the money, from the person who was originally bound to pay it.

*449] *For the *plaintiff*, in answer to these objections, it was insisted, that the assignment was under the act of assembly ; and the following books were cited : 1 Bac. Abr. 527–30 ; 2 Com. Dig. 560, *a*, 4 ; 2 W. Black. 1640 ; Ld. Raym. 442 ; 1 Salk. 133. That, by all the cases cited, it appeared, that the word *assigned* amounts to a covenant that the money shall be paid ; that it was immaterial, whether the assignment was legally made to Lynn or not ; since, if he had assigned what he had not a right to assign, that would, in itself, be a breach, to support an action of covenant ; that a bill, originally negotiable, will be so in the hands of every indorsee, although the indorsement should not be to order. 1 W. Bl. 295 ; 1 Str. 557. And that as this bond was assignable in its nature, by virtue of an act of assembly, the defendant, having undertaken to assign it, rendered himself liable, in an action of covenant, to every subsequent assignee. And that, if a demand was at all necessary, it sufficiently appeared in the general allegation in the declaration.

The Chief Justice now delivered the unanimous opinion of the court : That the assignment by Joseph Parker to Joseph Lynn was not an assignment according to the act of assembly (1 State Laws 77), but only a transfer of the equitable interest in the bond ; and that Joseph Lynn could not, by virtue thereof, maintain an action against the obligor, in his own name. The bond was payable to Lestarjette ; and, although Parker might have released it, it could only, at common law, be sued or assigned by the former. See Jenk. Cent. 221, ca. 75.

That Joseph Lynn, the defendant, only assigned his *equitable* interest in

the bond to George Turner. It appears, indeed, manifestly, by the previous assignment of Jacob Parker (which was equally known to Turner and to Lynn), that he had no other interest to assign. It is, therefore, the mere transfer of a *chose in action:* and even if an action of covenant might have been brought by George Turner against Lynn, on the word *assigned;* yet no such action could be maintained against him, by the present plaintiffs, as Lynn's assignment is not made to George Turner and *his* assigns.

That the covenant implied by the word *assigned*, extends only to this, that the assignee should receive the money from the obligor to his own use; and if the obligee should receive it, that, then the assignor would be answerable over for it.

By the Court.—For these reasons, let judgment be entered for the defendant.(*a*)

Quesnel *v.* Mussy.

Effect of a general power of attorney.

A general power of attorney empowers the agent to exercise a general release, in the name of his principal.

The defendant was brought before the court on a *habeas corpus*, when the following facts appeared: That this suit *had been instituted against him by Mr. Vanuxem, under the authority of a *special* letter of attorney from the plaintiff, who resided in one of the United States; that the day after judgment had been obtained, another person arrived with a *general* power of attorney from the plaintiff, and that this person, without consulting Mr. Vanuxem, settled with the defendant, to whom he gave a general release, in the name of his constituent. It appeared also, that the latter power of attorney was only authenticated by proof of the handwriting of the party, and of the subscribing witnesses, before the mayor of this city. [*450

Lewis moved, that the defendant might be discharged, by virtue of the release.

Du Ponceau objected: 1st, That the authentication of the *general* power of attorney was not agreeable to the act of assembly: and 2d, That a *general* power is not a revocation of a *special* one.

Lewis answered, that the question was not, whether a general power is a revocation of the special one; but whether it was a sufficient authority for granting the release. On this, he said, there could be no doubt; and with respect to the mode of authentication, he observed, that the act of assembly relates only to powers executed in a foreign country, and leaves the matter here to common-law proof.

(*a*) The decision in this case is said by Judge Duncan (in Folwell *v.* Beaver, 13 S. & R. 316), to have "been the acknowledged law ever since;" and he added, "if it were *res integra*, I, for my own part, would give no further effect to the word *assigned*." In Folwell *v.* Beaver, it was held, that the indorsement in blank by the payee of a sealed note, did not make him liable to the holder. See also Elliot *v.* Miller, Addis. 269; Graham *v.* Gondy, Id. 55, and the note to Wheeler *v.* Hughes, *ante*, p. 23.

THE COURT were of opinion, that the *general* power was sufficient for the purpose of the release; and having directed the person acting under it, to enter an acknowledgment of satisfaction on the record, they ordered the defendant to be discharged.

HOOTON *v.* WILL.

Relation of judgment.

Held, that a judgment related back to the first day of the term, so as to exclude a domestic attachment.

DOMESTIC ATTACHMENT. This cause being removed by *certiorari* from the common pleas, now came before the court, on the following case, stated for their opinion:

"The term of September, in the common pleas for the county of Philadelphia, in the year of our Lord 1782, began on the 4th day of September, and on the 16th day of September, in the same year, judgment was entered in the court aforesaid, in an action then depending at the suit of the plaintiff, above named, against John Levinz, which action had been brought to the term of June, in the same year. On the fifth day of the same month of September, a *domestic* attachment issued out of the same court, at the suit of John McFarland against the said John Levinz, and was served on the lands of the defendant, on the same day, at 11 o'clock in the morning. No auditors were ever appointed, nor any other proceedings had, under the said attachment, until a similar case was stated for the opinion of the court of common pleas for the county aforesaid, the 9th day of November, in the
*451] year of our *Lord 1784. At the time of rendering the judgment aforesaid, the said John Levinz was seised of the aforesaid lands in fee, and so continued until the same were sold under the same judgment, by the said William Will, as sheriff of the county, in whose hands the money remains. The question submitted to the court is, whether the said Benjamin Hooton, or the said John McFarland, is entitled to receive the money from the sheriff?"

The case was argued, at the last term, by *Lewis*, for the plaintiff, and *Ingersoll*, for the defendant, when two questions were made: 1st. Whether Hooton's judgment related to the first day of the term, so as to exclude the *domestic* attachment, in his favor? And 2d. Whether the domestic attachment, for want of the regular continuances, was not out of court?

Lewis contended: 1st. That the act of assembly, and English statute, with respect to docketing judgments, extend only in favor of subsequent purchasers for a valuable consideration. (1 Sm. L. 390.) 3 Black. Com. 420; 14 Vin. tit. Judgment, 616; Cro. Car.; s. c. Het. 72. Under the bankrupt laws, there is a relation to the time of the act of bankruptcy; and yet the legal relation of a judgment to the first day of the term, was held sufficient to defeat the claim of the commissioners. Sid. 271; Skin. 257.

2d. That from the case stated, it does not appear that auditors have been appointed under the *domestic* attachment. This, however, is not so material, as that there is no continuance of the cause. There is not, indeed, any law which directs a judgment in a *domestic* attachment; but since, on the report

of the auditors, the business is to be settled, until that is done, it is necessary to continue the action; as in the cases of a writ of *partition*, and an action of account. (See 1 Sm. L. 218.)

Ingersoll, on the first point, adverted to the opinion of the court of common pleas (see *ante*, p. 187), and urged, that the *domestic* attachment law (1 State Laws, 126), was to be considered as applying to an insolvent debtor, the great outlines of law with respect to a bankrupt. From the moment that the attachment is in the hands of the sheriff, the property ceases to be the defendant's, and must be disposed of agreeable to the act. See Comb. 33; Skin. 257. Under a commission of bankrupts, which is thus analogous to the domestic attachment, creditors are to be considered as purchasers, and nothing can exclude a general distribution, but an execution executed. See Co. Bank. Law. Fictions, indeed, ought never to be allowed to work an injury; but if the technical relation of a judgment to the first day of the term, were suffered, in a case of this nature, all the expense and trouble of a domestic attachment would be rendered oppressive and nugatory.

*2d. With respect to the second point, the act of assembly as to the appointment of auditors, is merely directory; and continuances [*452 are matters of mere form, which may be entered at any time; so that the court will even presume it to have been done. 2 Har. C. P. 312; 1 Str. 139; 2 Barn. Not. 172; 1 Sid. 53, 60. See 18 Vin. tit. Purchaser; Prec. in Chan. 478; *Schlosser* v. *Lesher*, *ante*, p. 411.

Lewis, in reply, still urged, that the acts for docketing judgments and recording deeds, were only made in favor of purchasers, and, although, generally speaking, every man who does not take by descent, is called in law, a purchaser, he contended, that the object of those acts was not of that general import, but merely to secure persons who had paid an actual and immediate consideration for the premises, and not to aid those who, by process of law, were endeavoring to recover an antecedent debt, which was the case in a domestic attachment. The attachment, when levied, is binding between the parties; but it does not affect the legal relation of a judgment obtained by another person; and the case cited from Co. B. L., is that of an execution taken out, but not levied. See Prec. in Chan. 478.

With respect to the omission of continuances, he answered, that if there was anything to enter them from, and day has been given to the defendant, from time to time, then the doctrine and authorities of the adverse counsel would apply. But he insisted, that where day was given to the defendant, and afterwards, nothing was done in the cause, the continuances could not be arbitrarily entered, in the manner suggested by the defendant's counsel.

After consideration, the CHIEF JUSTICE delivered the opinion of the COURT, in which he declared, that he and his brethren were unanimously of opinion with the plaintiff, on the case stated; and directed judgment to be entered accordingly.

Judgment for the plaintiff.(*a*)

(*a*) See the note to Hooton v. Will. *ante*, p. 187.

PRIMER, Plaintiff in error, *v.* KUHN.

Set-off.

The assignee of a bond given by an insolvent, who obtained his discharge after the bond became due, may set off the bond against the price of goods purchased by him of the obligor, although the latter had no notice of the assignment, at the time of the purchase of the goods.

Kuhn *v.* Primer, *ante*, p. 225, reversed.

ERROR from the Common Pleas of Philadelphia county. On the trial of the cause below (see *ante*, p. 225), a bill of exceptions was taken to the opinion of the court, in the following words:

"Trespass *sur le case*, in the common pleas, Philadelphia county; and now, the 6th day of February 1788, upon the trial of this cause, the counsel for the defendant, under the pleas of *non assumpsit*, payment and defalcation, and in order to maintain the same issue, offered to give in evidence a certain bond or obligation of the said Ludwig Kuhn (*prout* obligation), assigned (*prout* assignment), entered into by the said plaintiff, before his discharge under the insolvent act, and prayed that the moneys thereon
*453] *due might be defalked against the said Ludwig Kuhn's demand, which, it was argued, had commenced after his said discharge. To this the counsel for the plaintiff objected, and prayed the court not to admit the same obligation and assignment thereof in evidence; to which the court assented, and overruled the testimony. Whereupon, the said counsel for the defendant did, then and there, on behalf of said defendant, except to the said opinion of the court, and did, then and there, request of the said court to put their seals to this bill of exceptions, which was granted accordingly."

To the bill of exceptions, a memorandum was subjoined by the counsel, on both sides, stating, that the plaintiff below had notice of the bond and assignment, before the suit brought, but not before the sale and delivery of the goods by him to the defendant.

The refusal of the court of common pleas to permit the bond and assignment to be given in evidence, was the error now alleged; and on the 26th of September, the case was argued by *Levy*, for the plaintiff in error, and *Sergeant*, for the defendant.

Levy.—Before the acts of assembly are particularly examined, it may be proper to consider some of the inconveniences that existed, in such cases, at common law. Goods delivered in part might, perhaps, be given in evidence in an action of *assumpsit*, by way of mitigating the damages, but not under a plea of payment to a specialty; nor could the defendant discount any note, bill, bond, recognisance or judgment entered into by, or obtained against, the plaintiff. This necessarily multiplied suits and costs; and it often happened, that a plaintiff, in desperate circumstances, recovered against a defendant to whom he was, in fact, indebted in a greater sum. If, indeed by accidental circumstances, his action was brought to a conclusion, earlier than the defendant's cross-action, he might receive the money, and for his larger debt, become utterly insolvent, by the time the defendant had obtained a judgment.

Inconveniences of this kind have been perceived by the legislature, or judicial power, of the most enlightened nations, and a remedy, in a greater

or less degree, provided (See Lord Kaim. Prin. of Eq. 201, 2, 3, 4, 5); and in England, even before the statutes had given relief in the courts of common law, the courts of equity endeavored to provide for such cases. Show. Ca. in Parl. 17; 1 Vern. 121–2; 2 Id. 428–9, Case 390; 2 P. Wms. 128.

In Pennsylvania, there are two acts of assembly that treat of this subject (1 Sm. Laws, 49, and Ibid. 185). It is observable, that the first general provision by the former act, passed in 1705, was twenty-two years previous to the first general provision of the same nature in England, which was not till the 2 *Geo. II.*, *c.* 22, § 13. The latter act of assembly, however, is copied, almost *verbatim*, from the 2 *Geo. II.*, *c.* 22, and is posterior in point of time.

These two acts of assembly, made *in pari materia*, are, then, to be considered as remedial laws, and must receive a liberal construction: *and, as they declare, that where two are indebted to each other, they may [*454 set off their demands, it only remains to investigate the objections which are urged against the defalcation contended for, on behalf of the plaintiff in error.

The plaintiff below, in effect, says, that he has obtained the benefit of the insolvent act; and if he is compelled to pay or allow this bond in discount, his property is taken away to pay his old debts. This is true; but it is to be answered, by remarking, that the very insolvent act, on which he relies for the protection of his person, makes his future efforts liable for debts preceding his discharge; and herein consists the well-known distinction between bankruptcy and insolvency. See 1 State Laws 164, § 7 (1 Sm. Laws, 181); Jenk. Cent. 256, Case 49. This was the condition upon which he obtained his liberty; and having obtained it, shall he be thus allowed to evade the condition? As, upon an execution against him, his effects would be liable, it can make no odds to him, in point of justice, whether his creditor obtains payment by a cross-suit, or by defalcation. By the former mode, indeed, he might have an opportunity of secreting his effects, the moment that they were recovered in the action brought by him, and thus prevent his creditor from deriving any benefit by a subsequent judgment and execution. Such practices, however, have been too frequent to escape notice, and are too flagrant to be countenanced and supported in a court of law. Besides, the right of set-off is far more material against an insolvent debtor than any other person; for it is contrary to conscience, that he should recover against those to whom he is, in truth, indebted in an equal or larger sum. 2 P. Wms. 129.

But the plaintiff below may also urge, that the plaintiff in error is an assignee with whom he never dealt (see 1 State Laws, 48), and, endeavor to establish an analogy between his case, and that of a debt due to a man in right of his wife, which cannot be set off in an action against the husband on his own bond. Bull. N. P. 179. The reason, however, is essentially different. What is due to a husband in right of his wife, he must sue for in the name of himself and wife; and as discount is in the nature of a suit, to permit the set-off, in the case alluded to, would be adding a party to the suit, that is, the wife, who was not named in the writ. Besides, debts due to the wife are not absolutely vested in the husband; for if he does not reduce them into possession, they survive to her, and do not go to his executors.

But the second act of assembly does not say anything with respect to the party's dealing together; and even if there were any force in an objection grounded on those words, the answer would be easy, that the assignee of a negotiable, or assignable instrument, is as much contracted with, by the words of the obligation, "and his assigns" as the original obligee; and, under the act of assembly, he is equally the "creditor" of the obligor. See 1 State Laws, 165.

*455] *To illustrate this argument, suppose that C. gives his bond to D., which D. assigns to A.: A. gives his bond to E., which E. assigns to C.: A. then sues C. They are both assignees: what motive of policy, what principle of construction, could, in this case, preclude a discount? It is the object of law, to put an end to strifes; and the courts of justice are ever anxious to prevent an unnecessary circuity of action. Under the statute of 2 *Geo. II.*, which is in the same words with the acts of Pennsylvania, the judges of England have permitted an indorsement, after the suit brought, to be discounted; the practice requiring only that it shall be proved to have been made "before plea pleaded." Crompt. Pract. 161. And the case in 2 Strange 1234, makes no question, whether an assignee may discount, but merely turns upon the time of indorsement.

The objection, that the allowance of such accounts would be the means of preventing insolvent debtors from obtaining a subsistence, goes much too deep: it is considering inconveniences arising on a question which clear, and positive law has determined; for the act of assembly says, that the future effects of an insolvent debtor shall be liable to the payment of his old debts; and the judges of the courts of common law have extended the principle of discount, by a most liberal equity, far beyond the words of the statute in England. 2 Bl. Rep. 869.

Sergeant, for the defendant in error, contended, that the attempt to pay for goods, by the bond of an insolvent debtor, purchased at five shillings in the pound, or perhaps, obtained without any consideration, was in itself an act against conscience; that no case could be shown of a discount allowed upon an indorsement made after the action brought; for, Cromp. 161, is not a sufficient authority; that the rule of retaining, where there are mutual debts, did not apply; and that a set-off must be of a demand in the defendant's own right. He cited 8 Vin. 557; Bro. (Debt) pl. 170; s. c. Ibid; (Condition) pl. 181; 1 State Laws 48; 3 Black. 304; 2 *Geo. II.*, *c.* 22; 3 *Geo. II.*, *c.* 24; Bull. N. P. 179.

On the 3d of October, the Chief Justice, after stating the case, delivered the opinion of the court to the following effect:

McKean, Chief Justice.—As a discharge under the insolvent laws, while it exempts the person from future molestation, leaves the effects of the defendant for ever liable to the demands of his creditors, the discharge obtained by the defendant in error can have no operation in the decision of this cause.

A question has been made, whether the plaintiff in error might have defalked his bond, under the English statutes; the first of which takes notice of mutual debts, &c. The judges there, were, indeed, of opinion, that only debts of the same dignity could be set off; but for this, I can discover no good and satisfactory reason; and a remedy was afterwards provided by a

subsequent statute, which declares, that debts of different natures may be defalked.

The true ground, however, for the decision of this cause, arises from the construction of the several acts of assembly for the relief *of insolvent debtors, for the assigning of bonds, and for defalcation; and the last of these acts says, that "if two or more dealing together (which words are not to be found in either of the English statutes) be indebted to each other, upon bonds, &c.," when an action is commenced, the defendant may plead payment, and give his bond, &c., in evidence against the plaintiff's demand. [*456

If then, the obligee could have defalked the bond in question (of which, we think, no doubt can reasonably be entertained), and he has legally assigned all his right and interest in it to the plaintiff in error, why should not the assignee be entitled to the same advantage, since the act for the assignment of bonds has placed him on the same footing.

There is another clause in the defalcation act, which provides, that where a plaintiff and defendant have accounts to produce one against another, they may refer them, and the report of the referees shall have the effect of a verdict; now, although the words are confined to the case of accounts, yet the construction of the act has liberally extended the right and benefit of such a reference, to every other cause of action. For the sake of justice, and to prevent an odious multiplication of suits, we think, that the same liberality should be exercised in the case before us; and are unanimously of opinion, that the judgment of the court below ought to be reversed. (*a*)

Judgment reversed.

Græme *et al.*, administrators, *v.* Harris.

Foreign letters of administration.

Letters of administration, granted by the archbishop of York, in England, are not a sufficient authority to maintain an action in this state.

This cause came before the court on a case stated, which was, in substance, as follows:—The intestate, John Græme, in his lifetime, to wit, in December term, 1772, obtained a judgment against the defendant in a plea of debt, in the county court of common pleas of Philadelphia. He afterwards died, being resident, at the time of his death, in Great Britain, of which kingdom he was a subject. Upon his decease, the plaintiffs obtained letters of administration from the archbishop of York, in the said kingdom, which bore date the 25th of June 1784; but to this action, which was a *scire facias* to revive the above-mentioned judgment, the defendant pleaded that the plaintiffs never were administrators; issue was thereupon joined; and this question submitted to the opinion of the court, whether

---

(*a*) See Boinod *v.* Pelosi, 2 Dall. 43; Jacoby *v.* Guier, 6 S. & R. 448; Wilmarth *v.* Mountford, 8 Id. 124; Richter *v.* Selin, Id. 425; Marshal *v.* Sheridan, 10 Id. 268.

[1] Thompson *v.* McClelland, 29 Penn. St. 475. But the holder of an assigned claim must show that it was assigned to him, before suit brought. Speers *v.* Sterrett, Id. 192. And see Russell *v.* Spear, 4 W. N. C. 476; Kessler *v.* Angle, 2 Id. 23.

under the authority of the letters of administration granted by the archbishop of York, the plaintiffs could maintain the present action?

The point was argued, on the 26th of September, by *Rawle*, for the plaintiffs, and *Sergeant* and *Swift*, for the defendant.

Rawle relied on the act of assembly, which declares, that letters of administration granted out of the province were sufficient for the *purpose of bringing actions (1 Sm. L. 33). He urged, that this law, as well as other laws of the province, was recognised and confirmed by the act of the 28th of January 1777; that such letters of administration were a competent authority by the law of nations (Godb. 33, 47); and that it had been determined in a sister state, that letters of administration granted in New York, were sufficient to maintain actions in Connecticut. Kirby 270.

*457]

Sergeant and *Swift* contended, that the necessary operation of the revolution, had altered the law declared in the act of assembly, and the words "out of the province," were evidently meant of places within the British dominions. They urged, that this was an attempt to give more force to the letters of administration, than they would be entitled to even in the British dominions; for, if there were *bona notabilia* in England, and in Ireland, letters of administration must be taken out in both kingdoms (2 Bac. Abr. 399; 11 Vin. 59, pl. 6; Id. 74, pl. 1); or, even if there were *bona notabilia* in two different provinces, as Canterbury and York, letters of administration must be granted in each. Palm. 163. The arguments *ab inconvenienti*, are likewise in favor of the defendant: for if this authority is good, the creditors of the intestate must pursue the administrators in England, or any foreign country, where the law differs with respect to the priority of debts. Besides, the security given by administrators, is only with relation to the apparent value of the personal estate where administration is granted. See 2 State Laws, 41; Art. of Confed., art. iv.; Const. Penn. § 34.

The Court, having considered the case and arguments, were unanimously of opinion, that the letters of administration, granted by the archbishop of York, were not a sufficient authority to maintain an action in this commonwealth; and gave

Judgment for the defendant.(*a*)

(*a*) In McCullough *v.* Young, 1 Binn. 68 (also reported in 4 Dall. 293), it was said by the court, that the act of 1705 "has uniformly been considered not to extend further than to the provinces in this country at the time the act was passed, and Græme *v.* Harris turned upon that ground.[1] At the same time, it has been as uniformly understood, both before and since the revolution, that letters of administration granted in a sister state, are a sufficient authority to maintain an action here; and such has been the practice without regard to the particular intestate laws of the state where they have been granted."[2] This practice of recognising the authority of letters of administration granted in another state, is believed to be peculiar to Pennsylvania. At least, so far as the reports furnish information, a similar degree of faith and credit is not given to such

[1] Re-affirmed in Alfonso's Executors' Appeal, 70 Penn. St. 347, where it was determined, that the executors of a decedent, whose domicil was in Cuba, had no authority, under letters testamentary granted in Cuba, to transfer stocks in Pennsylvania.

[2] The case of McCullough *v.* Young was overruled in Sayre *v.* Helme, 61 Penn. St. 299.

Bunner *v.* Neil

Costs on removal from the Common Pleas.

This cause was removed by *habeas corpus* from the court of common pleas of Philadelphia county, and on the trial, a verdict was found in favor of the plaintiff, for 4*l.* 10*s.* 8*d.*, which the defendant paid to the prothonotary, and then moved to stay proceedings, contending, that as the plaintiff's demand was reduced below 10*l.*, by a direct payment, and not by discount or set-off, the plaintiff must pay the costs.

The plaintiff, on the other hand, obtained a rule to show cause why the defendant should not pay double costs, under the act of assembly, which provides, that, if the defendant removes the cause, and a sum under 50*l.* is found for the plaintiff, the defendant shall pay double costs.

*After argument, by *Swift*, for the plaintiff, and *Tilghman*, for the defendant, the rule to stay proceedings was made absolute; and [*458 the rule for payment of double costs was discharged.(*a*)

Thompson, Plaintiff in error, *v.* Musser. Two Actions.

Effect of verdict.—Evidence.—Amendment.

In debt on a penal bill, there was no averment in the *narr.*, that the defendant did not pay the sum mentioned in the condition, and the defendant pleaded payment: it was held, that the defect was cured by the verdict.

Practice of entering verdicts on the issue of *non solvit*, in debt in the *detinet*.

A copy of an act of assembly of another state, contained, with other acts, in a pamphlet, printed by the printers of the commonwealth, was held to be good evidence.

Where the court below permitted the declaration to be amended by the writ, after the jury had been sworn; and then had the jury sworn again, and received their verdict, without the consent of the defendant, and without giving him liberty to plead anew, and without an imparlance, or awarding payment of costs by the plaintiff, it was held, that the proceeding was erroneous.

These actions were removed by writs of error from the common pleas of Lancaster county; and on return of the respective records, the proceedings appeared to have been as follows:

I. On the first or larger record, it appeared, that a *capias* in an action of debt in the *detinet*, issued at the suit of John Musser against John Thompson, for 200,000 weight of tobacco; and the declaration set forth a penal

---

records in any other state. The inconveniences of the practice are obvious and frequently felt. In the argument of McCullough *v.* Young, Judge Hopkinson (then at the bar) suggested, that, upon the principle of recognising administration granted in another state, the personal property of an intestate, in this commonwealth, and which is the proper fund for payment of his debts here, might be taken away and applied in direct contravention of our own rules; and he instanced the case of the adjoining state of Delaware; where, at the time of the argument, and until a recent period, the law directed that creditors residing within the state should be first satisfied. The court seemed to admit that the practice of acknowledging the authority of foreign letters was productive of inconvenience, but they added, that the remedy lay with the legislature. Since that decision (1803), the inconveniences have certainly not been diminished by the increased number of states, and this consideration, as well as a due regard to the dignity of the state, seems plainly to require legislative interposition.

(*a*) See Silvius *v.* Smith, 3 Yeates 583, and the note to Cooper *v.* Coats, *ante*, p. 306.

bill, dated the 3d of January 1784, by which John Thompson binds himself in the penalty of 200,000 weight of net crop tobacco, of the inspection of Fredericksburg, or Falmouth, on Rappahannock river, in Virginia, to pay 100,000 weight of tobacco, of the same inspection, to John Musser, or his assigns, as soon as it could be collected of those who are indebted to the said John Musser and the obligor; but the said John Thompson agrees, that, in case it cannot be collected or obtained, he will be answerable for the same." After *oyer* of the bill, the defendant pleaded *payment*, the plaintiff replied *non solvit*, and thereupon issue was joined.

The case was tried at Lancaster, on the 7th of December 1786, when the plaintiff below gave in evidence the penal bill stated in the declaration, upon which an indorsement was made and subscribed, on the 25th of May 1785, that "it was agreed by the parties, that the within tobacco should be settled at the current price at Fredericksburg, on the 1st of May 1784; at which time, the within bond is considered due, and is to carry interest from the date." There was, likewise, a receipt on the back of the bill, signed by Musser's attorney in fact, on the 5th of July 1785, acknowledging that he "received the within bill in full."

On behalf of the defendant below, two indentures were given in evidence, from which it appeared, that the plaintiff and defendant had entered into a copartnership, for carrying on an inland trade, during a limited period; and on the indenture last made between them, a memorandum was indorsed, dated the 3d of January 1784, setting forth the receipt of the two penal bills, on which the present actions were brought, and declaring that the same, when paid, were to go in discharge of what was due from Thompson to Musser. Several letters were read from the latter to the former, in which it was confessed, "that Musser had no other claim, but upon these bonds,
*459] against Thompson, and that every payment, *which had been made since they were given, was on their account. The payment of a note for 46*l.* was then proved, and an agreement, which had been entered into by Musser, that, "on the payment of 400*l.* specie, and the remainder that may appear due, in warrants on the treasurer of the state of Virginia, which are received there in taxes at par, or equal to gold and silver, allowing Musser at the rate of 12½ per cent. on the whole amount of the said warrants, the same shall be a sufficient discharge of the bill." To prove the payment of Virginia warrants, according to the terms of the foregoing agreement, a receipt was produced from Musser's attorney, dated the 5th of July 1786, to this effect: "Received from John Thompson 1668*l.* 11*s.* 6½*d.* Virginia currency, in warrants on the treasury of Virginia, which is settled in specie at 1484*l.* 4*s.* 4*d.* Virginia currency; being in full payment of his bond to John Musser, dated the 3d January 1784, for 100,000 weight of net crop tobacco, of the inspection of Fredericksburg, or Falmouth, in Virginia." And in order to show that the warrants thus paid, were receivable in taxes, at par, or equal to gold and silver, the counsel for the defendant below offered to read an act of the legislature of Virginia (which contained a recital of a preceding act) on that subject, from a pamphlet, stitched in blue paper, with the following title page:—"Acts passed at a general assembly of the commonwealth of Virginia, begun and held at the public buildings in the city of Richmond, on Monday the 3d day of May, in the year of our Lord 1784. Richmond: Printed by John Dunlap and James Hayes, printers to

the commonwealth." But the reading of this act being objected to, on the ground that it was not legally authenticated, the court overruled the evidence; and a bill of exceptions to their opinion was tendered and allowed.

The jury gave a verdict for Musser, saying, that "they find 114,236 weight of net crop tobacco, of the inspection of Fredericksburg, or Falmouth, on Rappahannock river, to be due to the plaintiff from the defendant, value 2000*l.*, with six pence damages and six pence costs." Whereupon, judgment was entered generally.

II. On the second or smaller record, it appeared, that an action of debt in the *detinet*, for 200,000 weight of net crop tobacco, of the inspection of Richmond, or Petersburg, in Virginia, was brought on another penal bill of the same date, by which "John Thompson binds himself in the penalty of 200,000 weight of tobacco, to pay to John Musser, 100,000 weight of tobacco, of the last-mentioned inspection, at or before the 1st of May next ensuing the date of the bill." The pleadings were the same in this, as in the preceding case; but the declaration being erroneously for tobacco of the inspection of "Fredericksburg, or Falmouth, in Virginia, on Rappahannock river," the plaintiff's counsel, after the jury were sworn, moved to amend the declaration, agreeable to the tenor and purport *of the writ, by striking out those words, and inserting "Richmond or Petersburg," which the court allowed, without the consent of the defendant, and directed the same jury to be again immediately sworn for the trial of the cause. This being done, and the jury gone from the bar, the attorneys of both parties signed an agreement, that, "as it was then very late, the prothonotary of the court might receive the verdict, and that, if necessary, they would afterwards mould it into form." [*460

The verdict then finds, "17,853 weight of net crop tobacco, of the inspection of Richmond, or Petersburg, in Virginia, to be due to the plaintiff from the defendant, on the bill aforesaid, and the true value thereof to be 446*l.* 6*s.* 6*d.*, Pennsylvania currency, with six pence damages, and six pence costs." Whereupon, judgment was also entered generally.

Upon these records, the general errors were assigned, and *in nullo est erratum* pleaded, in both causes. They were argued together, first, at Lancaster, and afterwards, in two different terms, at Philadelphia, by *Bradford*, *Lewis* and *Wilson*, for the plaintiff in error; and by *Chambers*, *Heatly*, *Yeates*, *J. B. McKean*, *Sergeant* and *Ingersoll*, for the defendant.

The specific errors alleged against the first record, were four:

1st. That the declaration is for the penalty in a penal bill, but it omits to state, that John Thompson did not pay the smaller quantity of 100,000 weight of tobacco, or a certain sum of money in lieu thereof, on the day fixed for the payment; so that no cause of action is shown to have accrued to the plaintiff below for the penalty.

2d. That this being an action of debt in the *detinet*, the verdict is erroneous, because it finds 114,286 weight of tobacco to be due to the plaintiff from the defendant, and the true value thereof to be $2000, which they find of debt, &c., because the finding, being of so much tobacco due to the plaintiff, is not an express determination of the issue, which is *solvit* and *non solvit*; and because the finding is not of all that was in issue, since the declaration is for 200,000 weight of tobacco, but the verdict is only for 114,286, and nothing is said of the rest.

3d. That the judgment is erroneous, because, ensuing the nature of the verdict, it is for the value of the tobacco in money, and not for the tobacco itself; or, if that cannot be had, for the value thereof in money.

4th. That the court below were in error, in overruling the evidence of the printed copy of the act of assembly of Virginia, which purported to have been printed by the law printers of that commonwealth, respecting the nature and value of treasury warrants or certificates.

The second and third of these errors were also alleged and applied against the smaller record, with an additional exception, to wit, that after the jury had once been sworn, the court, without the consent of the defendant below, *461] discharged them, permitted *the plaintiff to amend his declaration, swore the jury again, and neither gave the defendant an imparlance, nor ordered the plaintiff to pay the costs occasioned by his faulty declaration.

The causes being held under advisement for a considerable time, in hopes that a compromise would take place between the parties, the Judges now delivered their opinions separately and at large.

McKean, Chief Justice.—The arguments on the records before the court have been ably and learnedly enforced. To these, and to the authorities produced on both sides, I shall briefly refer, while I consider in their order, the objections that have been made in favor of the plaintiff in error.

1. In support of the first objection, a variety of precedents have been shown of declarations upon penal bills from 1 Mod. Ent. 180, 281; Brown's Mod. Intrandi, &c., and the following books were cited: Doug. 658; 8 Co. 133; 4 Bac. Abr. 13; 7 Co. 10 *a*; 4 Bac. Abr. 16, 363; 5 Id. 321; Cro. Eliz. 548; Cro. Jac. 183, 500; Cro. Car. 515; Hob. 82, 232; 12 Mod. 81; 1 Bulstr. 163; Salk. 662; 2 Ld. Raym. 814; Carth. 322; Doctrin. Placit. 329; Co. Litt. 303.

But the counsel for the defendant in error have answered these cases, by urging, that *oyer* of the penal bill was prayed and granted; that the defendant below pleaded in chief to the declaration, *payment*, and joined issue; and that the *verdict* was for the plaintiff below. They contended, that the plaintiff was only bound to prove the gist of the action; that it was not incumbent on him to prove that the smaller quantity of 100,000 weight of tobacco was *not* paid; that under the act for defalcation (1 Sm. L. 49), the jury are to find the sum really due; and that the defect, if it was one, is cured by pleading over in chief, and also by the verdict. In corroboration of these positions, they cited, Doug. 658; 8 Co. 133; Vaugh. 93, 4, 5; 4 Bac. Abr. 19, 16; Hob. 199; 1 Lill. Pract. Reg. 418; Cro. Car. 209; 5 Com. Dig. 57, 58, 60; 1 Mod. 169; 1 Salk. 37, 38, 133; 8 Mod. 356; 1 Lev. 190; 12 Mod. 44; Cro. Jac. 668; Tri. per Pais 289, 290, 306, 307, 368; Cro. Car. 515; Cro. Eliz. 68; 12 Mod. 459, 414; Carth. 80, 94; 2 Wils. 380; Cowp. 407; 1 Str. 233; 2 Id. 925, 1006, 1011; 1 Wils. 255; 1 Salk. 9; Bull. N. P. 147, 148; 3 Black. 410; Barr. on Stat. 193; 2 Black. 406; 1 Vent. 108, 114, 122, 156; 1 Com. Dig. 60; 2 Vent. 153; Keelw. 187 *b;* 7 Rep. 10 *a;* 9 Vin. Abr. 599, pl. 1; 10 Id. 3, pl. 1; 16 & 17 *Car. II.*, *c.* 8.

We are clearly of opinion, that this defect in the declaration, with respect to the averment, cannot now be taken advantage of as an error. It might, indeed, have been fatal on demurrer; but, at this period of the cause, it is cured by the plea in bar, by the verdict, and by the statutes of

jeoffails. The defendant below pleaded payment, which admits the declaration to be good. 10 Vin. Abr. 3, pl. 12. The penal bill became part of the record by the *oyer*; and if the jury had not been satisfied that the smaller quantity was *not paid, they would never have given a verdict for [*462
114,286 weight of tobacco. This was the very thing litigated and determined; and it was the province of the jury, under the act of defalcation, to ascertain the balance, which must have appeared from the evidence. The verdict, therefore, also aids the omission of the averment. See 3 Black. Com. 394; Carth. 389; Jenk. Cent. 21, ca. 39; Ibid 288, ca. 24. Several of the cases cited on both sides do not apply; but all the late authorities (many of which are in point) support our judgment on this occasion. Those cases which bear a contrary aspect, occurred before the last of the statutes of *jeoffails*, and previous to the more liberal decisions of modern judges. 2 Burr. 756. The general rule, however, is now well established, that if a plaintiff states his title in his declaration in a defective manner, it will be cured by a verdict; but not so, if the title is totally defective in itself. Cro. Eliz. 778.(*a*)

2. The second objection is to the verdict; and to prove the invalidity of that, the counsel for the plaintiff in error, have cited, Cro. Jac. 681; Yelv. 71; 2 Roll. Abr. 693, tit. Verdict, pl. 5; Vaugh. 75; 4 Com. Dig. 155; 1 Inst. 227; Cro. Jac. 31; Cro. Eliz. 133; 2 Str. 1089; 2 Ld. Raym. 1581; 3 Lev. 55.

To this the defendant's counsel have replied, that strict form in a verdict is not now required; that it needs only to be understood what the intent of the jury was, agreeable to which the verdict may afterwards be moulded into form; that the constant practice in all the courts in this state, as well before as since the revolution, has been, to enter the verdicts on the issue of *non solvit*, in the manner that has been used in the present case; that the intention of the jury is plain; and that the mode of entering their verdict is the act of the clerk. Hob. 54; Co. Litt. 227 *a*; Salk. 328, pl. 2; 2 Lill. Abr. 798; 4 Bac. Abr. 58, 59, 99; 5 Id. 297, 298, 314; 2 Burr. 700; Cro. Eliz. 664. The court, concurring in these reasons, cannot allow this exception.(*b*)

3. That the judgment is for money, and not for the tobacco itself, or, if that cannot be had, then for the value thereof, makes the third objection; in support of which the following books are cited: Yelv. 71; 8 Vin. Abr. 41, pl. 15, 17, 18. But it is contended, on the other side, and such is the opinion of the court, that if the verdict is good, the judgment must likewise be so; (*c*) for being entered generally, when it is drawn at large, it may be put into form; and the merits having been tried, justice must be obtained

---

(*a*) See Carson *v.* Hood, 4 Dall. 108; United States *v.* The Virgin, Peters C. C. 9; Gray *v.* James, Id. 482; Welch *v.* Vanbebber, 4 Yeates 420; Miles *v.* Oldfield, Id. 423; Hockley *v.* Fulmer, Id. 130; Miles *v.* O'Hara, 1 Sm. Laws 18; Chesnut-Hill Turnpike Co. *v.* Rutter, 4 S. & R. 6; Weigley *v.* Weir, 7 Id. 309; Cavene *v.* McMichael, 8 Id. 441; Carl *v.* Commonwealth, 9 Id. 63; Stoever *v.* Stoever, 9 Id. 434; Crouse *v.* Miller, 10 Id. 155; Shaw *v.* Redmond, 11 Id. 27; Good *v.* Harnish, 13 Id. 99; Kerr *v.* Sharp, 14 Id. 399; Morrison *v.* Moreland, 15 Id. 61; Beale *v.* Commonwealth, 16 Id. 150; Strohecker *v.* Grant, Id. 237.

(*b*) See Easton *v.* Worthington, 5 S. & R. 133; Girard *v.* Stiles, 4 Yeates 1.

(*c*) See Lentz *v.* Stroh, 6 S. & R. 38; Friedly *v.* Scheetz, 9 Id. 164.

without being entangled in technical niceties. Cro. Jac. 502; 3 Mod. 270; 1 Wils. 1; 2 Str. 931, 1013; 1 Sid. 376; 5 Mod. 227; 1 Vent. 119; 2 Wils. 380; Cowp. 407.

4. The last error assigned in this record, respects the refusal of the court of common pleas to admit the defendant below to read in evidence, a copy of an act of assembly of the state of Virginia, printed by the law-printers there, and stitched up, with a few other acts, in a blue paper cover.

*463] *To maintain this objection, it has been argued, that in Great Britain, a public act of parliament is proved by the printed statute book; that a general history is a proof of a general transaction, though not of a particular one; that this is a general act, and promulgated in the usual mode of promulgating the laws of Virginia; that by the fourth article of the late confederation, the courts are obliged to take notice of the acts and proceedings of other states, as much as if they had occurred here; and that the ordinances of France, the laws of the Danish islands, proclamations in our sister states, the statutes of England, Ireland and Scotland, heralds' books and registers, have frequently been read in evidence in this court, because of their public notoriety. 12 Mod. 86, 215, 216, 403; 12 Vin. Abr. 119; 1 Atk. 47; 2 Eq. Abr. 406, 409; Cowp. 407; Gilb. L. Ev. 13.

In opposition to these arguments, it was contended, that the laws of Virginia ought to be proved as other facts in foreign countries; that in Great Britain, private statutes must be proved, either by sworn copies, or authenticated under the great seal; that every man is, indeed, obliged to know the laws of his own country, for they are presumed to be in every man's breast, and the statute book contains hints of them; but the laws of Virginia are unknown in Pennsylvania, and are not in any wise obligatory upon us; that the reason why private statutes must be proved, before they can be received in evidence, applies strongly to foreign acts of assembly, for no man is obliged to know them; that an act of assembly in print is no better verified than if it were in writing only; that this act of assembly might have been forged or repealed, and yet, it would be impracticable on a sudden, pending a trial, to prove it; and that there is no precedent of determination of any court, that such a copy is good evidence; for, indeed, it militates against the general rule of evidence, "that the best evidence the nature of the case will admit ought to be produced," and a sworn copy compared with the votes might have been had, or some other regular authentication. Gilb. L. Ev. 4, 5, 13, 16, 17; 12 Mod. 403; Vin. Abr. 129, pl. 59; Id. 119, 120; 1 Salk. 121; Cowp. 174; Prec. in Chan. 207; 1 Lill. Abr. 207; 3 Salk. 154; Doug. 1, 572; Bull. N. P. 21; Old Law of Ev. 66; Trials per Pais 232; 3 Journ. of Cong. 493, 12th November 1777.

This subject has been very ingeniously discussed. It is in a great measure new; so far, at least, that it does not appear to have come formally before any court, until it arose in the present cause at Lancaster. But, at the same time, I must remark, that I never heard until then of such evidence being refused; and without opposition, I am certain it has very frequently been admitted.

Our law is not confined to particular precedents and cases, but consists in the reason of them; for the reason of the law is the life of the law. I admit, that this printed copy of an act of assembly, though it purports

to have been printed by the law-printers of Virginia *is not such good evidence as a sworn copy, compared with the rolls, or an exemplification under the great seal; but these modes of authentication are, likewise, inferior to the original law itself. If the plaintiff in error had been sued in Virginia, this printed book of the acts of assembly would there, unquestionably, have been good evidence; and I can discern no satisfactory reason, why, as he is sued here, the same evidence should not be received, at least, *prima facie;* for although it were a forgery, and the proof in that respect could not, on a sudden, during the short period of a trial, be produced; yet, in case of any reasonable suspicion, the court might reserve the point, and give the party leave, upon establishing the fact, to move for a new trial.

Lord Chief Justice WILLES says, in the case of *Omichund* v. *Barker*, 1 Atk. 21, that "the rules of evidence are to be considered, as positive artificial rules, framed by men for their convenience in respect to the transaction of business in the courts of justice," but there has been no rule established, as far as my knowledge extends, concerning the evidence now under consideration. It has been a rule in the courts of Great Britain, "to allow such proof as they beyond the sea will allow." This, however, must be subject to restrictions: and although the general principle and rule of evidence is, "that the best evidence the nature of the thing will admit, shall be given," yet, by constant practice and allowance of the judges, this rule is frequently dispensed with. Were it not, indeed, for this, controversies in courts of justice would be entangled with too many difficulties, and attended with too great trouble and expense, to permit men to seek for redress of many wrongs in a legal way. The same reason that would induce this court to require a law of Virginia to be proved as any other fact, must induce them to insist upon the like proof of the laws of every other state, kingdom or empire, however remote; a position pregnant with intolerable inconvenience; destructive to trade, commerce and credit; and in several cases, fatal to justice.

Though the practice of the courts, or forms of pleadings, which pass *sub silentio*, do not make the law; yet, in a case like the present, a constant practice of permitting acts of assembly or laws to be read out of printed books, without opposition, is a great evidence of the law; and such printed copies, being of public notoriety, and relied on as genuine, have the presumption of authenticity in their favor, and afford a reasonable satisfaction to the mind of their truth and accuracy. Upon the whole, therefore, I am of opinion, that the court below erred in the rejection of the evidence in question; and that for this cause only, the judgment ought to be reversed.(*a*)

With respect to the errors alleged against the second record, they have all, except one, been considered and disallowed, in the course of the preceding observations. The one that remains to be decided is, that the court below, on motion of the counsel *for the plaintiff there, permitted the declaration to be amended by the writ, after the jury had been sworn; [*465

(*a*) In Jones *v.* Maffet, 5 S. & R. 532, Judge DUNCAN referred to Thompson *v.* Musser, as "a well-considered case;" and said, "the laws of our sister states have been constantly read in evidence from the printed statute books, without requiring an attestation taken under the act of congress." To the same effect are, United States *v.* Johns, 4 Dall. 412; s. c. 1 W. C. C. 463; Biddis *v.* James, 6 Binn. 321; and Kean *v.* Rice, 12 S. & R. 203.

and then had the jury sworn again, and received their verdict, without consent, without giving the defendant liberty to plead anew, and without an imparlance, or awarding the payment of costs by the plaintiff.

In support of this objection, it has been urged, that the amendment was an alteration in substance, and changed the nature of the defence; that there is no precedent of such an amendment, after the jury was sworn, therefore, it is hoped, that this court will not enlarge the precedents of amendments, by making a new one; and that the court below had no power to discharge the jury, after sworn, without consent; or, if they had, that they ought to have granted an imparlance. Stiles' Pract. Reg. 45, 49; Salk. 47; 3 Lev. 347; Carth. 465; 2 Black. Rep. 785; 2 Str. 890; Fitzg. 193; 3 Bac. Abr. 236; Gilb. Pract. C. P. 79, 80.

On the other side, it was insisted, that the amendment was only to make the declaration conformable to the writ; that the merits came before the jury, and the cause was fairly tried; and that such an amendment may be made at any time. 3 Black. Com. 406; Cunning. Rep. 43; 2 Burr. 756; 5 Id. 2834; 3 Lev. 347; Sir T. Raym. 53; 4 Burr. 2569; Cowp. 841; 1 Wils. 7; 4 Bac. Abr. 30; Comb. 13; 2 Vin. Abr. 326.

The court would willingly support this proceeding, if they legally could; for, they are no friends to exceptions like the present, where the merits have been fairly tried. But we can find no case, or opinion, to favor it in all its parts. I have met with but one, which mentions, that "after a jury sworn, sometimes a juror is withdrawn, on purpose that there may be an amendment, if it be not entered upon record." This case was not mentioned at the bar, but is reported in Comberbach 419, *Rex* v. *Edwards*.

Suppose, however, that the court had given the plaintiff leave to make the amendment, before the trial; which they might unquestionably have done, as the nature of the action was not thereby changed; yet, it was in the election of the defendant, either to take costs of the plaintiff, or to imparl to the next term; for he had a right to advise upon a plea fitting the declaration so amended; or, if the amendment did not, in his opinion, require an alteration of the plea, he might take the costs, and enter the same plea immediately. At all events, I think, he ought to have been allowed, if he pleased, to plead again, after the amendment, and so join a new issue. 1 Lill. Abr. 70 *d*; 71 *a*; Comb. 58; 2 Str. 950. And I have found two cases in Judge Jenkin's Centuries, in which it is held, that a jury discharged before verdict, shall not be charged again, but there must be a new *venire facias* Jenk. Cen. 7, ca. 9; Id. 283, ca. 13.

Since, then, the facts relating to the amendment appear upon the record, I am of opinion, that the proceeding of the court below was erroneous: and this judgment also ought, therefore, to be reversed.(*a*)

(*a*) See Smith's Lessee v. Brown, 1 Yeates 413, where the court permitted a declaration in ejectment to be amended, after the jury was sworn, to make it conformable to the record, without the consent of the defendant. It has been said, that the act of 1806 was intended to authorize the courts to grant amendments, after swearing the jury, as fully as they could do at common law, before swearing the jury; but not to require the court to allow amendments, which would change the ground of action, and introduce a new matter altogether distinct from that originally set forth. See Wilson v. Hamilton,

Thompson v. Musser.

*ATLEE, Justice.—In these two causes of John Thompson, plaintiff in error, v. John Musser, I concur with the chief justice, in every point except two.

One of these is the objection respecting the Virginia act, and the other is the mistrial. As to the first, it seems, that the justices below, on the trial of the cause, refused to admit in evidence, on the part of Thompson, a printed paper, said to be an act of assembly of the state of Virginia, upon which a bill of exceptions was filed; and this is now assigned as one cause of error.

Had that act come before them, exemplified under the seal of the state of Virginia, the court ought certainly to have admitted it, as it would then have been within the rule of law, which requires the utmost evidence the nature of the fact is capable of; but as it was offered to them, without such exemplification, or any proof of its being compared with the records of that state, or even of its being printed by the printer of the laws of the state, I cannot join the opinion, that the justices below have erred in rejecting it; or, that their having refused to admit it in evidence, in that situation, is a sufficient cause for the reversal of their judgment. It was offered to prove a fact respecting a certain class of Virginia certificates; and from the face of it, I think it will appear, that it is not the whole law of the state respecting those certificates. This might have been a reason with the court below for rejecting it, and I should have thought it a sufficient one; for a record is not to be taken by parcels, and the whole is evidence, or none.

We are to pay a due regard to the laws of our sister states, when we are under the necessity of determining upon contracts which have taken place within those states, and have reference to those laws: but we are to be cautious, and not to suffer ourselves to be imposed on. Exemplifications are easily obtained, and they are not expensive. We find, that the judges in England have generally had the precaution to require exemplifications of acts of parliament, which did not concern the kingdom in general, properly compared and certified, before they would admit them in evidence in their courts of justice; though made within the kingdom, they do not deem themselves obliged by their offices to take notice of them, without such exemplification. And so, I think, it is a proper and necessary precaution in the courts here, to require certified copies of the laws of our sister states, before they are admitted with us; especially, when they appear before us, as this did, in pamphlets of a few sheets, not bound up with their body of laws; and as we are not obliged, and cannot be supposed, to know their laws, it seems the more necessary.

As to the mistrial in one of the causes, it seems to me, that the parties themselves, at the time of the trial, waived every advantage that might have been taken of it. They permitted the amendment, and went on to trial, without demanding an imparlance; the merits of the cause were fully heard; and after the jury left *the bar, the counsel on both sides agreed, by writing under their hands, that the verdict should be taken by the clerk of the court, agreeable to what should appear to be the intent of the jury, and that they would mould it into form. After this conduct, and such [*467

---

4 S. & R. 240; Farmers' and Mechanics' Bank v. Israel, 6 Id. 294; Wilson v. Wallace, 8 Id. 53.

proceedings, I think the objection ought not to be supported. But as my brethren think differently from me, on these points, the judgment in both causes must be reversed.

Rush, Justice.—There can be no doubt, that the laws of Virginia are evidence ; but the question before the court is, in what manner shall they be authenticated, in order to render them admissible evidence to a jury ?

Upon established rules of law, and also, on general principles, I am of opinion, that the Virginia act, printed by the government printer, ought to have been given in evidence to the jury.

No evidence shall be received, which supposes a still greater evidence behind, in the party's own possession and power. On this ground, the printed act ought to have been laid before the jury ; because, it cannot be said, that either the original, or a copy under seal, was in his possession or power. Both might have been refused to him at the office in Virginia ; and this court, having no control over that office, could not have given any relief. All law should be construed, as far as may be, so as to guard against what men may do ; and not to trust to what they will do.

Sir William Blackstone, in the third volume of his commentaries, page 336, speaking of the court of chancery, says, "If a question comes before that court, or a court of law, which is properly the object of a foreign municipal law, they will both receive information what is the rule of the country, and will both decide accordingly. Both courts follow the law of nations, and collect it from history, and the most approved authors of all countries, where the question is the object of that law; as in the case of the privileges of ambassadors, hostages or ransom bills. In mercantile transactions, they follow the marine law, and argue from the usages and authorities received in all countries." From this language, it would seem to be the opinion of the author, that the same evidence, which any court abroad would have received, would also be received in England, where the subject in litigation requires it.

If, then, the Virginia law might have been given in evidence in that country, of which there can be no doubt ; it was the duty of the court in Pennsylvania to have received information of the rule or law of Virginia, from the same source that would have been satisfactory to the judges there. Every country has a right to promulgate its laws as it pleases ; and whatever printed authorities are received in a foreign country as evidence of its laws, are, in my opinion, evidence of the same laws to a court and jury in Pennsylvania.

*468] *To the larger record, as it was called at the bar, to distinguish it from the other, a second objection has been made, to wit, that the declaration does not say, that the defendant neglected to pay or deliver 100,000 weight of tobacco ; the declaration being on a penal bill. With regard to this point, I rather think, that the verdict will not cure the objection. The case in Cro. Car. 515 (*Baynes* v. *Brighton*), seems to be in point. Debt was brought for forty shillings ; and the declaration was held ill, after verdict, because the plaintiff had not alleged, that the twenty shillings were not paid at the day ; for, otherwise, the forty shillings were not due. I am induced to lay the more stress on this authority, because the principle of that case is recognised both in Douglas and Salkeld's reports.

In Dougl. 657, by a recent and solemn decision of the whole court, it has been held, that if the indorsee does not prove at the trial a demand on the acceptor and refusal, even a verdict, in such case, will not help him. The well-known case of omitting the *scienter* is there admitted to be law. The case is expressly referred to, as reported in Salk. 662. The declaration was, that the defendant kept a bull that used to run at men, but did not say *scienter*, *&c.* This was held ill, after verdict; for the action does not lie, unless the master knows of this quality; and the court cannot intend it was proved at the trial, as the plaintiff need not prove more than was in his declaration. So, in the case at bar: the court cannot intend that the plaintiff proved at the trial, that the defendant did not pay or deliver 100,000 weight of tobacco; because, not being alleged in the declaration, the plaintiff was not under any necessity of proving it. With respect to the other objections to the larger record, I entirely concur with my brethren.

I concur also, that there has been a mistrial in the other cause tried between the same parties. W. Black. 785, is in point. Where the declaration is amended in a material point, a rule should be given to plead. If the plaintiff has a right to amend, he is also bound, at the same time, to give a rule to plead, that the defendant may not be surprised at the trial; and omitting to do so, is error. The jury was sworn to try the precise and identical issue joined by the pleadings; and if that was afterwards altered or changed by the plaintiff, the verdict will not help it; because a verdict will not help that which was not in issue. Gilb. Hist. and Pract. Com. Pleas, p. 100.

The court below had no power to discharge the jury, after they were sworn, without the consent of both parties. It is true, that in 2 Str. 1117, it appears, that a jury was dismissed, after they were sworn, because no issue was joined. But as there was an issue joined in the cause of *Musser* v. *Thompson*, the court below have acted erroneously, and contrary to law, in discharging the jury, without the consent of both parties.

I think, upon the whole, that judgment should be reversed in both causes.

*Bryan, Justice.—As I agree entirely in the opinions given by the chief justice, for the reasons which he has assigned, I shall content myself with generally declaring, that I think the judgments on these records ought both to be reversed. [*469

By the Court.—Let the judgments of the court below, on both records, be set aside.

Respublica *v.* Negro Betsey *et al.*

Slaves.

Under the act of 1st March 1780, a negro born *before* that date, and not registered agreeable to the directions of the act, could not be held as a servant until he attained the age of twenty-eight years; but was absolutely free.

This was a *habeas corpus ad subjiciendum*, which had been allowed by Mr. Justice Bryan, and afterwards, brought by him before the court. The case was twice argued; first, on the 29th of June 1786, by *Bradford*, on be-

half of Samuel Moore, who claimed the negroes as his servants, and by *Lewis*, in behalf of the negroes; and a second time, in April term, 1789, by the same counsel for the claimant, and by *Ingersoll* and *Fisher*, for the defendants. The court having held the matter under advisement until the present te. m, the judges delivered their opinions separately, in the following order; the chief justice stating the circumstances of the case, and the arguments of the counsel, in the course of his observations.

McKean, Chief Justice.—The negro Betsey, for whom the *habeas corpus* issued (and upon whose fate, that of the two other negroes depends), was born before the 1st of March 1780, to wit, in the 1779, and her name, age, sex, &c., were not registered in the office of the clerk of the peace of the county of Chester, in which the master, Samuel Moore, then inhabited, on or before the 1st of November 1780, agreeable to the directions of the act of assembly, entitled, "An act for the gradual abolition of slavery," passed on the 1st of March 1780. (See 1 Sm. L. 492.)

The question that is submitted to our consideration upon these facts, is, whether the negro can be held as a servant, until she attains the age of twenty-eight years? or, whether she is *absolutely* free?

On the part of the master, it has been argued, that, although by the fifth and tenth sections of the act of assembly, the owner or master of any negro or mulatto slave, or servant for life, or for thirty-one years, then within the state, or his lawful attorney, ought to cause such negro or mulatto to be registered, on or before the 1st day of November 1780: yet, by the fourth section, it is provided, that every negro or mulatto child, born within this state, after the passing of the act, who, in case the act had not passed, would have been born a servant for thirty-one years, for life, or a slave, shall be deemed a servant until the age of twenty-eight years. It was urged also, that the legislature could not intend a greater favor to negroes and mulattoes, born as slaves, or servants for life, or until the age of thirty-one years, before the passing of that act, than to those born after; that the intention of
*470] the legislature is to govern in the construction of this act, which, as *well as in other legislative acts, in doubtful cases, must be construed according to the reason and sense of the law-makers, expressed in the several parts of the act, or to be collected by considering the frame and design of the whole. 11 Mod. 161. And that the maxim is *ubi eadem ratio, ibi idem jus.*

For the negro Betsey, the counsel have agreed in the rule for the construction of acts of assembly, but they argue, that the fifth section of the act under consideration is positive, that all negroes and mulattoes, held as slaves or servants for life, or until the age of thirty-one years, should be registered before the 1st of November 1780, or that they should be free; that this was the intention of the legislature is confirmed by the tenth section, which declares that they shall be deemed free-men and free-women; that where the words are express and positive, there is no room left for construction; that the law favors liberty more than property; and that if the case should appear doubtful, the judgment should be in favor of the liberty of negro Betsey.

Since the argument, the court have again read the act of assembly, and maturely considered that, and the several reasons urged by the learned counsel on both sides; and as this is the first case that has come before them,

upon the arguments of counsel, and as the judgment now to be given will govern in all cases of the like sort, for the future, it seems to be proper, to give the grounds and reasons upon which they found their decision.

It may be observed, that neither in the fifth nor tenth sections, is it said, that negroes or mulattoes, held as slaves, or for life, or until thirty-one years of age, not registered on or before the 1st of November 1780, shall be free, and discharged from any longer service, but only (by the fifth section), that they shall not be deemed to be slaves, or servants for life, or until the age of thirty-one years; and by the tenth section it is added, that they shall be deemed as free-men and free-women. The words "free-men and free women," seem to have been used in opposition to the word "slaves," or "servants for life," or "until the age of thirty-one years," and not to mean that they shall be absolutely free from every species of servitude. Had this been the intention of the legislature, words were easily to be found to express it in the most unequivocal manner.

There is a section in this act of assembly, which was not adverted to by the counsel, on the first hearing, that contributes to clear up the intention of the legislature on this point: It is the sixth, and comes in by way of proviso or restraint upon the fifth. There, the owners or masters of any such negroes or mulattoes, "though not registered," shall be answerable for their maintenance, in case they become paupers, unless such owners or masters shall manumit them, before they arrive at the age of twenty-eight years; by which it is evidently implied, that the former owners or masters may still have an interest in them, notwithstanding they should not be registered; otherwise, why should it be made a condition of an *exemption from maintenance, that they should execute and record in [*471 the proper county, a deed or instrument, securing to such slaves or servants, their freedom before twenty-eight years of age?

The interest remaining to the owner or master, in an unregistered negro or mulatto, is not expressly declared in any part of the act; but from the scope of the whole, it may be collected, that the meaning and intention of the legislature was, that all negro or mulatto slaves, or servants for life, or until they should arrive to thirty-one years of age, within the state at the time of passing the act, who were then under the age of twenty-eight years, might be detained as servants, until they arrive to that age, though they should not be registered; but if the master detained them in service until that age, and they should afterwards become chargeable, in such case, he, his executors, administrators or assigns, should be obliged to maintain them. This construction seems to be further warranted from that part of the sixth section, which assigns the reason for registering the names, ages and sexes of slaves, and servants for life, and until thirty-one years of age, to wit, in order to ascertain and distinguish them from other persons; those born before or after passing the act, and under twenty-eight years of age, as well as those who should not be registered, though above twenty-eight years of age.

Though the act of assembly, with respect to this question, is not so clear as it might have been, and as I could wish it, and though different gentlemen may reasonably entertain different sentiments concerning it, yet, as I must give an opinion, it must be my own. Upon the whole, then, I think, that negro Betsey should remain as a servant until she shall arrive at the age

of twenty-eight years, unless freed sooner by her master; and that she be then entitled to the like freedom dues and other privileges, as if she had been born after passing the act for the gradual abolition of slavery.

I know not what other construction to put on the sixth section. If the word "not" in the fifth line from the end of this section, had been expunged, I should have been of a different opinion; but the engrossed act has been examined, and the word "not" is in it. The legislature must have had some meaning in using this word, as well as in the sentence that provides, that, "unless his or her master or owner, shall, before such slave or servant attain his or her twenty-eighth year, execute and record in the proper county, a deed or instrument, securing to such slave or servant his or her freedom."

By this judgment, if I should be mistaken, the negro Betsey is in no worse situation, than if she had been born after the passing the act, and I do not know a reason why she should be in a better. Were she discharged from her master, she would be incapable to take care of herself, and her parents are unable to educate her: she cannot suffer so much by living with a good master, as being with poor and ignorant parents. By a contrary judgment, she, as I have just hinted, would be little benefited, and her
*472] master, who *hitherto has derived no advantage from her services, and has been subjected to considerable expenses for her food, clothing and lodging, would be a great sufferer; so that the balance on this consideration seems, likewise, to preponderate on the side for which I have declared my opinion.

ATLEE, Justice.—This cause was argued in the supreme court, in June 1786; but as Mr. Justice RUSH and myself were then absent, another argument was requested for our satisfaction, and the gentlemen of counsel for the parties having obligingly acquiesced in our wish.

The question arises upon an act of assembly of this state, entitled, "An act for the gradual abolition of slavery," passed on the 1st day of March, in the year 1780; and it is, whether a negro child, born before the passing of that act, and not registered agreeable to the directions it contains, shall be free, or be in a similar situation with those born after the passing of the act, that is a servant until twenty-eight years of age?

It is agreed, that these negro children were born before the passing of the act, and that they and their parents were, at the time, the slaves or servants for life of Samuel Moore, of Chester county, who neglected to register them agreeable to the directions of the act. In consequence of this neglect on his part, the parents have obtained their freedom and the children now seek it, that they may follow, and be under the care and direction of those parents, instead of a master.

The act, after declaring in the third section, that negroes and mulattoes, born after it was passed shall not be deemed slaves or servants for life, and extinguishing all slavery of children, in consequence of the slavery of their mothers, provides in the fourth section, that such children as should be born after the passing of the law (who would, in case it had not been made, have been born servants for years or life, or slaves), shall serve until they attain the age of twenty-eight years, and in case of such children being abandoned by the master or mistress, directs their being placed out apprentices by the overseers of the poor.

So far the act confines itself to children born after it was passed. The following section, to wit, the fifth, includes every description of these people, of both sexes and all ages, and under this and the tenth section it is, that the parents of these children have obtained their freedom. This directs that every owner of negro and mulatto slaves, or servants for life, or until the age of thirty-one years, at that time within the state, shall cause the names, ages and sexes of such their slaves and servants to be registered, or entered on record, in books to be provided for that purpose, by the clerks of the sessions in the several counties of the state, on or before the first day of November 1780; and declares, that no negro or mulatto then within the state, shall, from and after the said 1st day of November, be deemed a slave, or servant for life, or until the age of thirty-one *years, [*473 unless his or her name shall be entered as aforesaid on such record. And by the tenth, it is enacted and declared that, no man or woman, of any nation or color, except the negroes and mulattoes who shall be registered as aforesaid, shall be deemed, adjudged or holden, within the territories of this commonwealth, as slaves or servants for life; but as free-men and free-women.

Under these sections of the act, it should seem, that freedom is secured to every negro or mulatto within the state, at the time of making the act, who was not registered agreeable to its directions, on the 1st day of November 1780; but a doubt hath arisen, under the sixth section, with respect to those who are under the age of twenty-eight years, though born before the making of the act.

This section comes in by way of proviso to the fifth, and declares, That any persons who had the ownership or right to the service of any negro or mulatto, at the time of passing the act, his or her heirs, executors, administrators and assigns, shall be liable to the overseers of the poor of the city or place to which such negro or mulatto shall become chargeable, for the expenses such overseer may be put to, through the neglect of the owner, master or mistress of such negro or mulatto, notwithstanding the name and other descriptions of such negro or mulatto shall not be entered and recorded as aforesaid; unless the master or owner shall, before such slave or servant attain his or her twenty-eighth year, execute and record in the proper county, a deed or instrument securing to such slave or servant, his or her freedom.

This clause has given rise to the argument, and it is contended, on behalf of Samuel Moore, that he has a right, upon a just and reasonable construction of it, to the service of these children, until they arrive to their respective ages of twenty-eight years, notwithstanding they were born before the passing of the act, and were not registered. But I cannot hold with that opinion.

The fifth section of the act requires entries of all the negro and mulatto slaves, or servants for life, or until the age of thirty-one years, within the state at the time of making the act; it directs the mode of those entries; it fixes the time within which the entries shall be made: and without any exception in respect to their ages, declares that no negro or mulatto then within the state, should be deemed a slave or servant for life, or for thirty-one years, unless his or her name should be registered within the time limited. The master or owner had his election whether to enter them, or not;

if he did, he secured to himself the right he had in them before the making of the law; and if he did not, it appears to have been the intention of the legislature, that he should forfeit all right to their services. The tenth section, I think, shows this expressly; for it not only enacts that such unregistered persons shall not be deemed as slaves or servants for life, as in the other sections, but adds that they shall not be holden or adjudged so; and fur-
*474] ther, that *they shall be deemed, adjudged, and holden as free-men and free-women, in opposition to every species of servitude before taken notice of in the act. As this ambiguous section seems annexed indeed as a proviso to the fifth, it may be taken as intended to deter persons from holding in their service negroes and mulattoes, whom they had not registered according to law.

Had the legislature intended, that all those who were born before the making of the act, and had not attained the age of twenty-eight years, should serve until they arrive to that age, they would have shown that intention in express terms. As persons of that description among the negroes and mulattoes, made a great part of their number, they would have made provision for those of tender age, who might happen to be abandoned by their owners, as they have done with respect to those born after the act, and abandoned; they would have made like provision for their redress, in case of severe treatment, and in proportion to their terms of servitude before they attained the age of twenty-eight years, they would have directed freedom dues, as they have done for the others.

With respect to persons of this color, those who were servants among us, before the passing of the act, were either slaves or servants for thirty-one years: the servitude of twenty-eight years is created by this act, and appears to me to be limited to those who are born of registered slaves, after it was passed, and to those only.

The preamble to the act, among the unhappy circumstances formerly attending these people, mentions their being cast into the deepest affliction by an unnatural separation and sale of husband and wife, from each other, and from their children: in the present case, it is attempted to separate these children from their parents, by a construction which appears to me to clash with the intention of the makers of the law; while such a construction as will secure freedom to them, and restore them to their parents, will, I think, agree best with the design of the legislature.

I am, therefore, of opinion, that the implied construction contended for in behalf of Samuel Moore, on a doubtful and dark clause in the act, cannot be admitted to operate in his favor, against the express letter and direction of its fifth and tenth sections; and, consequently, that these persons ought to be discharged from his service.

Rush, Justice.—The question on the *habeas corpus*, in the case of Samuel Moore's negroes, is a question of construction, arising on the act for the gradual abolition of slavery.

It is admitted, that those negroes were born before the 1st of March 1780, the date of the law: and that Samuel Moore, who now claims them, was then in possession of them, and that he neglected to register them. It
*475] is also admitted, that they were slaves for life, when the act passed. *On the one hand, it is contended, that his neglecting to register

them, it is attended with an entire loss of their service for life; and on the other, that it divests the right only from and after the age of twenty-eight years.

Whatever be the intention of the legislature, *that* must govern. But the difficulty is to find out the intention. An act of assembly, being the declared will of the legislature, is to be construed altogether; like the last will and testament of an individual.

When the act for the gradual abolition of slavery passed, there were in Pennsylvania two species of slavery derived from birth; the one being a slavery for life, the other for thirty-one years. The latter took place where a child was born of a white mother by a black father. The usage in such case has been, to hold the issue in slavery until the age of thirty-one years, in consequence of its base birth. This shows the reason why the legislature have used the terms "slave, or servant for life, or thirty-one years," in the fifth section of the act: the words are, "No negro or mulatto within this state shall, after the first of November, be deemed a slave, or servant for life, or till the age of thirty-one years, unless entered upon record;" to prevent and abolish slavery arising from birth, being the great object of the law, as may be seen in the third section of the act now under consideration. It shows further, that those expressions were not adopted by the legislature, with a design to admit slavery until the age of twenty-eight, in the case of children born before the act.

By the particular wording of the tenth section, it would seem, at first view, as if the right to service in the case of a registered slave, who was such by his birth, until the age of thirty-one years, was either wholly taken away; or, that registering him, would make him a slave for life. The words are different from the fifth section, and are remarkable. The clause runs, "No man or woman, of any nation or color, except negroes or mulattoes registered, shall be a slave or servant for life, but free." Here, the words, "or till the age of thirty-one years," are omitted. Now, if no negro or mulatto man or woman, unless registered, can be a slave for life, it seems to be a natural consequence, that if registered, they will become slaves for life. But this construction is most certainly erroneous; because it proves too much, as it would include slaves for thirty-one years. Again, if registering does not make him a servant for life, which it cannot do, so neither does this clause give the master a right, in consequence of registering such negro, to detain him until the age of thirty-one years. In the genuine and liberal construction, therefore, of the tenth section, the words, "or till the age of thirty-one years," should be supplied; and then it will speak the same language with the fifth section, and convey the same idea.

The true intent and meaning, then, of those two sections, considered in one view, I take to be, that all negroes and mulattoes *born at the [*476 time of passing the act, shall be free from every degree of servitude, unless registered by those who had a right to their service for life, or thirty-one years, or by their attorneys.

This construction of the law, is corroborated by adverting to the fourth section of the act. By this section, in case any after-born child should be abandoned by its master or mistress, from an idea that its service until the age of twenty-eight, was not a sufficient compensation for bringing it up, or from any other cause, the overseers are directed to take charge of it. But

why provide for a child born after the act, in case it should be abandoned, and not for a child born before the act, in a similar situation? Surely, an abandonment was as likely to happen in the one case, as in the other, and from the same cause. The silence of the legislature on this point affords a striking argument to prove, that they never entertained an idea that children born before the act, were to be servants until the age of twenty-eight; otherwise, the same provision would have been made in both cases. The master, in the case before the court, had it in his power to have acquired a right to the children for life, if he had chosen to register them; or by neglecting it, to give them up for ever: and this observation appears to me a satisfactory answer to the argument, that children born before the act, ought not to be placed in a better situation than those born after it. The master might have put them in a much worse situation; and having run that chance, they ought not now to be placed on the same footing with those born after the act.

But the greatest difficulty in the cause still remains; that is, the sixth section of the act. By this clause, "Every owner of a negro or mulatto, at the time of passing the act, his heirs, executors, administrators and *assigns* shall be liable to the overseers of the poor, where such negro or mulatto shall become chargeable, for such necessary expenses as the overseers may be put to, through the neglect of the owner or master of such negro or mulatto; notwithstanding the name and other descriptions of such negro or mulatto shall not be entered and recorded as aforesaid; unless his master or owner shall, before such slave or servant attain his twenty-eighth year, execute and record in the proper county, a deed or instrument securing to such slave or servant his freedom."

The first observation to be made on this section is, that the neglect of the owner or master therein mentioned, does not mean his neglect to register, but his neglecting to provide for the negro, whereby the overseers are obliged to do it. I have on several former occasions considered this clause with a good deal of attention. I once suspected there was a mistake in it, and that the word *not* should be expunged in the paragraph which says, "notwithstanding the name and other descriptions of such negro or mulatto, shall *not* be entered and recorded as aforesaid." *Accordingly, I examined at the roll's office, the law signed by the speaker, and also the recorded act, but found them both correspond with the printed law. I still think, however, in construing the act, *that* word should be rejected. The clause then will mean this—that, notwithstanding such act of registering, whereby a right is vested in the master, yet in case the negro should become unable to support himself, and the overseers should do it, the master should be liable to them. In other words, although you comply with the law, and register your negro, which will make him your property; yet, that circumstance shall not exempt you from the burden of supporting him afterwards; unless you set him free by deed, recorded in the proper county, before he attains the age of twenty-eight years.

*477]

If it should be observed, that this would make the legislature say a very idle thing, to wit, that a man shall be bound to support his own slave; I answer, the clause goes further: it prohibits him from abandoning his right, unless he does it *before* his arrival at the age of twenty-eight; and where, at the time of registering him, he was above that age, he can never after

wards abandon his right, but shall remain always liable to support him. Twenty-eight years was esteemed a proper age, in case of emancipation, under which, it might be reasonably supposed, that a negro, by a course of industry for a number of years, might add so much to the public stock of wealth, as to be entitled to receive support from the public, if he should be unable to help himself.

By the old law, a person might set free his negro at any age, on giving security at the county court, that he should not become chargeable to the public, but that law being repealed by the act now under consideration, it became necessary to restrain the exercise of that right, and to put it on some equitable footing: which this clause has done, by ordering that the owner of a negro, although registered, shall always be liable for any necessary expenses the public may be put to, through his neglecting to provide for him, unless he shall set him free before the age of twenty-eight, in the manner prescribed by the act.

This construction of the sixth section is still further confirmed by attending to the word *assigns;* every owner of a negro, his executors, administrators and *assigns*, shall be liable, although the negro be not entered and recorded. But there can be no assignee of an unregistered negro, because he is free. The clause, therefore, plainly supposes a transferable property in such negro to exist, which can only be by registering.

To this construction, it may be objected, that there will be no precision in the act, in case of a wilful neglect to register old negroes, with a view to throw them on the public; for, by not registering them, they became free. It would be a sufficient answer to *say, that if due provision be not made in every possible contingency, the evil must remain until the legislature think fit to remove it by a new law on the subject. But we may observe, that, in fact, there could have been few negroes so old as to be absolutely useless; and still fewer masters so forgetful of past services, and insensible to the feelings of humanity, as to neglect registering their old negroes, in order to turn them out of doors, and render them a burden to the public. As nothing of this kind has ever yet been heard of, we may safely pronounce, that the legislature has acted wisely in supposing that any provision in such case, would have been entirely superfluous. [*478

Upon the whole, if we read the act without the word *not*, the law in all its parts will appear a consistent and rational system. In any other view of it, nothing can be more obscure, perplexed and unintelligible. The word, in all probability, has slipt into the act by inadvertence; some member mistaking the design of the clause, and moving *that* as an amendment, which has proved the source of so much intricacy and litigation.

Instances are not wanting where, in construing wills, courts have rejected or supplied words, to comply with the intention of the testator. It is not necessary to cite the authorities to this purpose, as they are familiar to every one. In the construction of statutes too, judges have sometimes gone contrary to the general words of it. They have expounded the words of an act *contrary* to the text, to make it agree with reason and equity. (19 Viner 514.) There can be no exposition against the direct letter of an explanatory statute—which admits there may be against an original statute. Where the terms and letter of a statute are obscure and difficult, we must resort to the intent. (19 Viner 517, 520.) Though the statute of 1 *Eliz.*

makes void all leases by bishops, to all intents and purposes, yet the lease is good against the lessor. To which cases I will only add a determination lately given in this court, in the case of *Levinz* v. *Will* (*ante*, p. 430). Although the words of our act of assembly declare, "that no mortgage deed shall be good or sufficient to pass any freehold or inheritance, or any estate for life or years, unless recorded within six months from the date;" yet this court very properly held such mortgage good against the mortgagor; a decision which is certainly repugnant to the express words and letter of the act.

I concur, therefore, with my brother, Judge ATLEE, that the negro children Betsey, Cato and Isaac, mentioned in the return to the *habeas corpus* as detained by Samuel Moore, should be discharged; it appearing to me, he holds them in custody against the law of the land.

BRYAN, Justice.—In this case, I confess, that hitherto I have agreed in opinion with the CHIEF JUSTICE; but I now unite with *my brothers, *479] ATLEE and RUSH, upon this principle, that it was in the power of Samuel Moore to have secured the service of the negroes in question; and having omitted to do so, he cannot, on the one hand, take advantage of his own negligence; nor, on the other, will an ignorance of the law excuse him. The tenth section of the act of assembly seems, indeed, inaccurate and insensible; but, as upon a clause of so obscure a kind, I would not wish to press an argument against liberty, I must declare my voice to be in favor of the discharge of the negroes.

BY THE COURT.—Let the negroes be discharged.(*a*)

(*a*) See Pirate v. Dalby, *ante*, p. 167; Miller v. Dwilling, 14 S. & R. 442.

COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

DECEMBER TERM, 1789.

LYLE, administrator, *v.* FOREMAN.

Foreign attachment.

While a man remains in the state, though avowing an intention to withdraw from it, he must be considered an *inhabitant*, and therefore, not the object of a foreign attachment.

THIS was a foreign attachment, which issued returnable to the present term; and, on arguing a rule to show cause why the writ should not be quashed, it was proved, that, on the 5th of December, the defendant was at Lancaster, on his way to Fort Pitt, where he intended to proceed to the Spanish settlement below the Natchez, on the Mississippi, but was actually at Fort Pitt, on the 2d of January 1790.

SHIPPEN, President, observed, that while a man remained in the state, though avowing an intention to withdraw from it, he must be considered as an *inhabitant*, and therefore, not an object of the foreign attachment. If an inhabitant clandestinely withdraws, or secretes himself, to avoid his creditors, he becomes liable to the domestic attachment. The having once been an inhabitant will not, however, protect a man for ever from a foreign attachment, where he has notoriously emigrated from the state, and settled elsewhere. But the case before the court is that of a foreign attachment issued at the very time that the defendant was an inhabitant of the state which cannot be maintained.

Let the rule be made absolute.(*a*)

Wilcocks and *Sergeant*, for the plaintiff. *Ingersoll*, for the defendant.

(*a*) If the debtor be actually *dwelling* in the county where the writ issued, although he may not be an *inhabitant*, so as to come within the domestic attachment laws, his effects are not liable to a foreign attachment. Bainbridge *v.* Alderson, 2 Bro. 51. See Lazarus Barnet's case, and Taylor *v.* Knox, *ante*, p. 152, 158.

*Graff *v.* Smith's Administrators.

Contribution.

Where one died intestate, indebted to several persons, and leaving several children, and after a sale of certain parts of his real estate, by order of the orphans' court, for payment of debts, the remainder was divided among his children, and the eldest son sold his share to *bonâ fide* purchasers; it was *held*, that the purchasers were bound to contribute in aid of the other heirs, whose lands remained unsold, to the payment of the remaining debts of the intestate.

This case came before the court on a rule to show cause why the sheriff should not be directed to postpone the sale of lands taken in execution, in the hands of the purchasers from John Smith, the eldest son of Robert Smith, the intestate, until all the lands remaining unsold, in the hands of the other children of Robert Smith, should be sold by virtue of the execution.

After argument, the President stated the circumstances of the case, and delivered the opinion of the court, in the following manner.

Shippen, President.—The facts agreed on both sides in this cause, are, that Robert Smith died intestate, indebted to several persons, and possessed of a considerable real estate, but not of sufficient personal estate to pay his debts; that his administrators applied to the orphans' court for an order to sell certain parts of the real estate, sufficient to pay the debts and maintain the children; that such order was accordingly obtained, and that part of the real estate was sold for that purpose; that a subsequent application was made to the orphans' court for a division of the remainder among the children; that the part allotted to John Smith, the eldest son, on that division, was by him sold and conveyed to *bonâ fide* purchasers; and that John Smith was himself an administrator, and neglected to discharge all the debts out of the sum arising from the sale of the lands ordered to be sold by the orphans' court, but wasted the money, and is supposed to be insolvent. Some of the creditors of Robert Smith, whose debts remained unpaid, have since obtained judgments, and issued executions against the lands of the intestate, as well those sold by John Smith, under the order of division, as against the lands remaining unsold in the hands of the younger children. Three questions have arisen upon the argument.

1. Whether, upon the death of the intestate, his lands were bound to the payment of the debts, in such a manner, as that they may be taken in execution and sold, notwithstanding the heir may have previously sold and conveyed the same to *bonâ fide* purchasers?

2. Whether the purchasers from one of the heirs, are bound to contribute to the other heirs?

3. Whether the purchasers under the order of the orphans' court, are likewise bound to contribute?

I. In order to solve the first question, it will be necessary to take into view the several acts of assembly which subject lands to the payment of debts.

The act of 1700 subjects all lands of debtors to sale on judgment and execution against them, their heirs, executors, and administrators. *482] *The act of 1705 repeats the same provision, with the restriction that, if the clear yearly profits will pay the debt in seven years, the land shall be delivered to the plaintiff upon a reasonable extent.

Under these acts, the real estates of debtors have been held liable to sale by execution, whether they be living or dead; if living, under a judgment and execution against themselves: if dead, under a judgment and execution against their heirs, executors or administrators.

By the intestate act, passed likewise in 1705, there is a particular provision in case of intestacy, that the administrator may sell such parts of the real estate as the orphans' court should allow of, as sufficient to pay the debts, maintain the children, and improve the residue of the estate. By this act, the surplusage, or remaining part of the intestate's lands, not sold, or ordered to be sold, by virtue of that act, is directed to be divided among the intestate's widow and children, in the proportions therein expressed. Although the surplusage only is here directed to be divided, yet the construction has always been, that where there are no debts, or where they have been otherwise satisfied, the division shall, notwithstanding, take place, the act being considered as a general law of descents and distribution.

It is contended, on one side, that the word surplusage in the latter act implies strongly that the remaining part only of the real estate, after payment of debts, is vested in the heirs, and that they shall take nothing until the debts are paid; or, if they do take them, it must be *cum onere*. On the other side, it is said, that the act was made for a particular purpose, that the word surplusage relates only to the remainder of the lands not ordered to be sold by the orphans' court, and that there are no words which express or imply the surplusage to mean, after payment of debts.

Upon the former construction, however, it is urged, that, immediately on the death of the intestate, there is a *lien* created on all the real estate in favor of the creditors. Without entering into the doctrine of *liens* under the words of this act, which would only affect the estates of persons dying intestate, I would choose to consider the question on broader ground; that is, how far, and in what manner, the real estate of deceased persons, whether they die testate or intestate, is bound by our laws to the payment of their debts.

That such real estates are a fund for the payment of debts, is not controverted; but it is contended, that they are no otherwise a fund after the death of the debtor, than in his lifetime; and that as he himself could have aliened before judgment, so his representatives could likewise alien, and that the lands are not specifically bound, until judgment against the executors or administrators—that *if, indeed, they are then unsold, they remain a fund, but if aliened, no remedy remains except a personal one against the seller. [*483

The real and personal estates are both funds for the payment of debts. The personal estate, there is no doubt, is immediately bound, on the death of the debtor; it goes into the hands of the executor or administrator, and is assets in his hands for the payment of debts; specific personal property, being in its nature perishable, may be sold for that purpose, and the executor or administrator is personally bound to answer for the value. In the case of the administrator, he must give security, before the administration is committed to him; in the case of an executor, being intrusted by the testator, he gives no security, in the first instance; but in case of probable insolvency, he may be compelled likewise to give security. In both cases,

the whole personal estate, or its value, is bound, from the moment of the debtor's death, to the payment of his debts.(*a*)

The real estate is, likewise, confessedly, a fund for the payment of debts. It is a fund, however, that does not actually go into the hands of the executor or administrator, as assets in the ordinary course; but it is a fund, made such by positive law, in another form; that is, creditors may issue executions, and sell it for the payment of their debts, on a judgment against the executor or administrator; for it is not necessary, nor has it been usual, to bring the action against the heir. The lands, however, go into the hands of the heir or devisee, who gives no security, and between whom and the creditors there is no privity; they are made a fund for the payment of all debts, and must necessarily have been intended by the legislature to be a certain, and not a precarious fund; for since it is declared, that the creditors may take them in execution on a judgment against the executor or administrator, it must be meant, that they should have the fruit of that execution; and as there is the same reason, under the law, that they should be equally liable with the personal estate, from the death of the debtor, they must necessarily be liable in such a manner as to be answerable at all events, which can no otherwise be, than by considering them as specifically liable, in whosesoever hands they may be. If it were otherwise, they would prove no fund at all; for the devisee or heir, knowing that if judgments were obtained, he should lose his land, would, in every instance, where he apprehended debts beyond the amount of the personal estate, immediately sell them, and thereby entirely defeat the intent of the legislature, in making them a fund for the payment of debts.

The mischief of this doctrine is still more striking, if we consider, that the estates of the inhabitants of Pennsylvania, out of the city of Philadelphia, are chiefly real estates, and if they were immediately alienable by the heirs, without being afterwards liable for the ancestor's debts, few creditors to any amount would ever recover their debts, although, perhaps, the debts may really have been contracted on the credit of the lands. *Another consequence might likewise follow, that where the father dies indebted, leaving sufficient real estate, and but little personal, if the heir or devisee, being likewise indebted on his own account, takes the land in the manner contended for, then *his* creditors, by obtaining judgment against him, before his father's can obtain judgment against the executors, will recover their debts out of his father's lands, whose creditors would in that case be entirely cut out. This would certainly be too unjust, and repugnant to the spirit of our laws, ever to receive the sanction of a court of justice.

*484]

On these grounds, it is, as I take it, that lands of deceased persons, have always heretofore been considered as liable to be taken in execution for debt, in the hands of a purchaser from the heir or devisee. It is a construction of the law that has so long prevailed, that it would be now very dangerous to unsettle it, as many titles to land may depend upon it.(*b*)

Although there may not have been any express determination of this

---

(*a*) See Keyzey's case, 9 S. & R. 72.

(*b*) s. p. Morris *v.* Smith, 1 Yeates 243; Wilson *v.* Watson, Peters C. C. 273.

point, yet a point has been determined which is within the reason of the case. A widow's right of dower commences with her marriage; it is held so sacred a right, that no judgment, recognisance, mortgage, or any incumbrance whatever, made by the husband after the marriage, can, at common law, affect her right of dower: even the king's debt cannot affect her. Yet, it has been held, under our acts of assembly, for making lands chattels for the payment of debts, that as to lands taken in execution, after the death of the debtor, the widow is barred of her dower. If the widow whose right initiated with the marriage, shall lose her dower in favor of creditors, by much stronger reason the heir, whose right did not commence until the death of the debtor, should be barred from taking the land discharged of the debts.

II. The second question in this case is, whether, after a *bonâ fide* sale by one of the heirs, the purchaser is bound to contribute in aid of the other heirs, whose land remains unsold?

Where there is equal equity in two contending parties, it is always an unpleasant task to decide between them; and in that case there can be no satisfactory rule but the *strictum jus*. If there should, however, be any *laches* on one side, and none on the other, this, even on equitable principles, will have considerable weight in the decision.

The rules of contribution, as they appear in *Herbert's case*, in 3 Co. 13, are these—If a man is seised of three acres of land, and enters into a recognisance or statute, and enfeoffs A. of one acre, and B. of another, and the third descends to the heir; in this case, if execution is sued only against the heir, he shall not have contribution; for, coming to the land without consideration, he sits in the place of his ancestor, and shall not have contribution against any purchaser. But if execution be sued against one of the purchasers, he shall have contribution against the other purchaser and the heir. So, *if judgment be obtained against a man that dies, leaving [*485 two daughters, who make partition, in this case, if only one is charged, she shall have contribution; for, as one purchaser shall have contribution against another, so one heir shall have contribution against another heir, for they are *in æquali jure*. The *dictum*, that the heir shall not have contribution against any purchaser, clearly means any purchaser from the ancestor, and cannot, consistently with the case stated in Coke, mean any other. If, then, one parcener shall have contribution against another parcener, it is most clear, that one co-heir under our laws of descent, shall have contribution against another co-heir. But a distinction is made between a co-heir and a purchaser under him. Every purchaser, except in some special cases, stands in the shoe of the person he purchased from, and cannot have a better title than he had: and as to contribution, he holding under one of the co-heirs, must be considered as *in æquali jure* with the other co-heirs.

One of the special cases, where a purchaser stands in a more favorable light than the person purchased from, is, where there is a secret trust, and the purchase is made without notice, and there the purchaser shall hold the land discharged of the trust. But there appears no similarity between that case and this, where the law of the land having made real estates chattels for the payment of the debts of the ancestor, every purchaser from the heir must be presumed cognisant of it, and is bound to take care, if he will make

the purchase, to be secured against such debts. If he neglects this, he seems to confide in the seller, that he hath both the will and ability to do it.

The hardship upon purchasers may, in particular instances, be great, but may generally be prevented by a proper caution. Where there has been a suspicion of out-standing debts, it has been very usual to make the purchase under an execution. At any rate, the fundamental security which the law has given to creditors should not be destroyed, or the title of co-heirs affected, by the omissions or temerity of purchasers.

It is here suggested, that there may be probably sufficient in the hands of the younger children to pay the debts, without calling on the purchasers. But is it reasonable, is it just, or can it be legal, that the younger children should be stript of all their fortunes, and that the share allotted to the eldest son, who had no better right of exemption than they, should not bear part of the burden? especially, as those younger children had no participation in the sale, or wasting the money: nor was it by any precaution whatever, in their power, to prevent either; whereas, it was in the power of the purchasers to be indemnified, if they had thought proper. Such a doctrine would enable the elder son, in most cases, to lay the whole burden upon the younger children, who are frequently helpless; and during their minority at least, prevented from standing an equal chance with him.(*a*)

*486] *III. The remaining point to be considered, is, whether the purchasers under the order of the orphans' court are likewise bound to contribute? These purchasers, I acknowledge, appear to me to stand in a very different light from the voluntary purchasers from the eldest son. The law, for the benefit of the families and creditors of persons dying intestate, has vested the orphans' court with a power to direct the sale of certain parts of the intestate's real estate, for the payment of his debts. The same law has directed the means of information to be given to the court, to prevent imposition and the unnecessary dismemberment of the real estate. The power given to the orphans' court by this act is very great, and ought to be discreetly exercised; but when the sale is made under their order, it is certainly a good one. The administrator is vested with as complete a power to sell the specified part of the real estate, as he has, by the common law, to sell the personal; and the purchasers from him ought to hold as securely in the one case, as the other. To say, that because the administrator is to exhibit upon oath an account of the debts, therefore, the purchasers are to look to the payment of those debts, is in effect saying, that the purchasers are to look to the legal exercise of the power vested in the orphans' court, who may, unquestionably, impose such terms upon the administrator, as are necessary to secure to the creditors and children, the consideration money arising from the sales; and such security has, in fact, been required in many instances by the orphans' court in Pennsylvania. Besides, if the purchaser is to look to the payment of the debts, he must, likewise, look to the other objects for which the land is to be sold; that is, the education and maintenance of the children, and the proper improvement of the residue of the estate; which no law founded in reason could require. The case of these purchasers, however,

---

(*a*) See Guier *v.* Kelly, 2 Binn. 299; Wilson *v.* Watson, Peters C. C. 273; Bryant *v.* Hunter, 3 W. C. C. 48; Nailor *v.* Stanley, 10 S. & R. 450; Miller *v.* Stout, 2 Bro. 294.

is not regularly before the court; their lands have not been taken in execution, neither are they comprised within the rule.(*a*)

The rule, as it stands, must be discharged.

Pringle *v.* McClenachan.

Award.

A report of referees set aside, where they admitted the accounts of one of the parties as conclusive evidence of the value of specie and depreciated money.

This cause being referred, a report was made in favor of the plaintiff, to which the following exceptions were filed by the defendant:

1. For that the referees have entirely omitted to charge the plaintiff, John Pringle, with the sum of 146*l.*, specie, for a loss on a policy of insurance that he underwrote to the defendant, Blair McClenachan, upon the brig Nancy, Richey, master, on a voyage from Cadiz to Philadelphia, in 1775.

2. For that in the month of December 1776, there was a balance due from John Pringle to Blair McClenachan of 2455*l.* 13*s.* 4*d.*, as appears by the account-current furnished the referees; *and yet the referees, by continuing down the subsequent items of account in continental money, to August 1780 (when they struck a balance of 21,191*l.* 13*s.* 0*d.*, continental money, at seventy for one), have reduced the balance of 2455*l.* 13*s.* 4*d.*, specie, due to Blair McClenachan in 1776, by a scale of depreciation of seventy for one; so that instead of 2445*l.* 13*s.* 4⅓*d.*, Blair McClenachan has credit for about 35*l.* 1*s.* 8*d.*, specie. [*487

3. For that in an item of 6403*l.* 17*s.* 8*d.*, continental money, on a transaction of November 1778, to the debt of Blair McClenachan, they have omitted to charge him with that sum in November 1778, and reduce it by the scale of seventy for one, as they did the balance in August, but have taken that single item out of the general mass of the account, which amounts to upwards of 360,000*l.*, continental money, and reduced it by a scale of six for one; which, upon their own principles, will turn to the disadvantage of Blair McClenachan 975*l.* 16*s.* 7*d.*, specie.

4. That Blair McClenachan, in September 1777, drew a bill of exchange on Newry, payable in London, for 200*l.* sterling, in favor of John Pringle, which was protested; and the defendant, Blair McClenachan, never had notice thereof, until the latter end of 1778, or beginning of 1779, and the referees have charged the defendant for the same, the sum of 656*l.* 19*s.* 3*d.*, specie, and by reason of the referees having scaled the aforesaid balance of 21,191*l.* 13*s.* 0*d.*, at seventy for one, the said Blair McClenachan, has to his credit for the said bill only the sum of 8*l.* 11*s.* 5*d.*, specie.

After argument, the President delivered the opinion of the court, as follows:

(*a*) In Moliere's Lessee *v.* Noe, 4 Dall. 450, it was expressly decided, that a purchaser under a sale by order of the orphans' court, took the land free from judgments and other debts of the intestate; but, it seems, not discharged from mortgages. And see McPherson *v.* Cunliffe, 11 S. & R. 432.

Pringle v. McClenachan.

SHIPPEN, President.—The court have deliberately considered this case, and are unanimously of opinion, that the referees, although men of knowledge and integrity, have hastily adopted a principle not warranted by law, which, if sanctioned by this court, would be productive of manifest injustice.

The accounts that had been exhibited by one party to the other, were certainly evidence against him who exhibited them, as to the articles which they contained,(*a*) but could not be considered as evidence, much less conclusive evidence, of what was not stated or distinguished in them—I mean the value of the specie and depreciated money. This appears to have been a principal subject of dispute between the parties, and ought to have been open to discussion before the referees. Yet, under the idea that this was conclusive evidence, they have totally refused to consider the items of the account as to their real value, or to exercise their judgment upon them; but, by applying a certain rate of depreciation to the balance of the whole account, they have involved a large sum of hard money in a depreciation of seventy for one. They have also scaled sums which had been omitted in the accounts, in a very different manner from what they have done other advances made about the same time, by which an unequal measure of justice is dealt out to the parties.

*488] *The principle that the referees adopted, having been taken up, before it could be known on which side it would operate, either beneficially or injuriously, they are not chargeable with any designed partiality; but it was surely too hazardous and uncertain an experiment, to be a proper foundation for doing equal justice.

Although the court, on the present instance, have entered further into the merits of the case, than they usually do in reports of referees, they do not think that they depart from the spirit of former decisions, as they ground their judgment upon the conduct of the referees, in declining the consideration of the most material subject of the controversy; and that too, upon a mistaken principle, leading to real injustice to one of the parties

Let the report be set aside.

(*a*) Morris *v.* Hurst, 1 W. C. C. 433; Bell *v.* Davidson, 3 Id. 328.

APPENDIX.

The Case of the Court of Chancery in Pennsylvania.

King Charles the second, by his royal charter, dated at Westminster, the 4th of March, in the thirty-third year of his reign, was graciously pleased to grant unto William Penn, Esquire, son and heir of Sir William Penn, deceased, and unto his heirs and assigns, a large tract of land in America, in the said charter particularly described, and to erect the same into a province and seignorie, by the name of Pennsylvania. His said late Majesty was likewise pleased, for the good and happy government of the said province, to grant to the said William Penn, and his heirs, certain privileges and jurisdictions, in the following words, viz.:

"And forasmuch as we have hereby made and ordained the aforesaid William Penn, his heirs and assigns, the true and absolute Proprietor of all the lands and dominions aforesaid. Know ye, therefore, that we, reposing special trust and confidence in the fidelity, wisdom, justice and provident circumspection of the said William Penn, for us, our heirs and successors, do grant free, full and absolute power (by virtue of these presents), to him and his heirs, and to his and their deputies and lieutenants, for the good and happy government of the said country, to ordain, make and enact, and under his and their seals to publish, any laws whatsoever, for the raising of money for the public use of the said province, or for any other ends appertaining either unto the public state, peace or safety of the said country, or unto the private utility of particular persons, according unto their best discretion, by and with the advice, assent and approbation of the free-men of the said country, or the greater part of them, or of their delegates or deputies, whom, for the enacting of the said laws, when and as often as need shall require, we will, that the said William Penn and his heirs shall assemble, in such sort and form as to him and them shall seem best, and the same laws duly to execute unto, and upon, all people within the said country and limits thereof. And we do likewise give and grant unto the said William Penn and his heirs, and to his and their deputies and lieutenants, full power and authority to appoint and establish any judge or justices, magistrates and officers, whatsoever, for what causes whatsoever, for the probate of wills and the granting of administration, within the precincts aforesaid, and with what power soever, and in such form as to the said William Penn or his

heirs shall seem most convenient; also to remit, release, pardon and abolish, whether before judgment or after, all crimes and offences whatsoever, committed within the said country against the said laws (treason and wilful and malicious murder only excepted), and in those cases, to grant reprieves until our pleasure may be known therein, and to do all and every thing and things, which unto the complete establishment of justice, unto courts and tribunals, forms of judicature, and manner of proceedings, do belong, although in these presents express mention be not thereof made, and by judges by them delegated, to award process, hold pleas, and determine in all the aforesaid courts and tribunals, all actions, suits and causes whatsoever, as well criminal as civil, personal, real and mixt; which laws, so as aforesaid to be published, our pleasure is, and so we enjoin, and require and command, shall be most absolute and available in law, and that all the liege people and subjects of us, our heirs and successors, do observe and keep the same inviolable in those parts, so far as they concern them, under the pains therein expressed or to be expressed; provided, nevertheless, that the said laws be consonant to reason, and not repugnant or contrary, but (as near as conveniently may be) agreeable to the laws, statutes and rights of this our kingdom of England, and saving and reserving to us, our heirs and successors, the receiving, hearing and determining, of the appeal and appeals, of all or any person or persons, of, or belonging to the territories aforesaid, or touching any judgments to be there made and given."

By another clause in the said charter, "Power is granted unto the said William Penn, and his heirs, by themselves, or by their magistrates and officers, in that behalf duly to be ordained, to make and constitute fit and wholesome laws and ordinances, from time to time, within the said country to be kept and observed, as well for the preservation of the peace, as for the better government of the people there inhabiting, and publicly to notify the same to all persons whom the same doth or may any ways concern; which ordinances shall be observed inviolably in the said province, under the pains therein to be expressed, so as the said ordinances be consonant to reason, and be not repugnant or contrary, but (so far as conveniently may be) agreeable with the laws of the kingdom of England, so as the said ordinances be not extended in any sort, to bind, change or take away the right or interest of any person or persons, for or in their life, members, freehold, goods or chattels."

It is by the same charter likewise declared, "That the laws for regulating and governing property within the said province, as well for the descent and enjoyment of lands, as likewise for the enjoyment of, and succession of goods and chattels, and likewise as to felonies, shall be and continue the same as they shall be, for the time being, in the kingdom of England, until the said laws shall be altered by the said William Penn, his heirs or assigns, and by the free-men of the said province, their delegates or deputies, or the greater part of them."

Oct. 28, 1701. The said William Penn was pleased to grant to the inhabitants of Pennsylvania, by his instrument or charter in writing, duly executed under his hand and seal, divers liberties, franchises and privileges, so far as in him lay, to be held and enjoyed by the adventurers into, and the inhabitants of, the said province, in which charter is contained (*inter alia*) the following remarkable clause:

"Sixthly. That no person or persons shall or may, at any time hereafter, be obliged to answer any complaint, matter or thing whatsoever, relating to property, before the governor in council, or in any other place, *but in the ordinary course of justice*, unless appeals thereunto shall be hereafter by law appointed."

Likewise, another clause in the following words, viz.: "And no law or ordinance whatsoever shall, at any time hereafter, be made or done, to alter, change or diminish the form or effect of this charter, or any part or clause therein, contrary to the true intent and meaning thereof, without the consent of the governor for the time being, and six parts of seven of the assembly met."

This charter, thus granted by the said William Penn, and by him signed, having been distinctly read in the house of representatives, and by them being approved of, was thankfully received and signed by six members of the proprietor's and governor's council, and by the speaker, in behalf of the house.

In pursuance of the powers granted by the royal charter, the courts of law and equity have been sometimes established by acts of assembly, and sometimes by ordinances. In the year 1710, an act of assembly was passed, entitled "An act for establishing courts of judicature in this province." By this act, the power of determining cases in equity, was vested in the respective county courts of common pleas, with an appeal to the judges of the supreme court, who were likewise judges of law in the last resort, in Pennsylvania. In the year 1719, the last-mentioned act was repealed by his late Majesty in council. Upon the repeal of this act, for many successive terms, no courts were held at all, except the city courts of quarter sessions, which derived their power from a charter granted to the city of Philadelphia by the said William Penn.

To supply this defect, and to prevent a failure in the administration of justice, Sir William Keith, then governor, thought fit, by virtue of the power granted to the said William Penn, his lieutenants or deputies, to establish the several courts of law, by commission granted by him for that purpose. But no provision was made at all for determining cases in equity, and consequently, the subject was altogether remediless in that particular, till 1720. When the said Sir William Keith, then governor, taking this grievance into consideration, did, in the month of May in the said year, by message to the house of representatives then sitting, lay the whole matter before them, praying their advice and assistance, in order to supply so great a defect in the administration of justice.

4 May 1720. The said house of representatives having maturely advised upon the subject-matter of the message, came to the following resolve (which is said to have been unanimous).

Resolved, "That considering the present circumstances of this province, this house is of opinion, that for the present, the governor be desired to open and hold a court of equity for this province, with the assistance of such of his council as he shall think fit, except such as have heard of the case in any inferior court."

June 8, 1720. The governor, Sir William Keith, laid the aforesaid resolution of the house before his council, which was then entered upon, and referred to further consideration.

Court of Chancery.

Aug. 6. The matter being again resumed in council, the board, after mature consideration, concurred in opinion, "That by virtue of the powers granted by the royal charter to the late proprietor, his heirs and assigns, and to his or their lieutenants or deputies, being regularly appointed, the present governor, William Keith, Esquire, may safely comply with the desire of the representatives of the free-men of this province, signified to him by an unanimous resolution of their house, dated the 4th May last past."

The board, deliberating likewise upon the best and securest method of establishing the said court, came to the following resolution, viz. :

"That as often as the governor is to sit in chancery and hold a court, all the members of council in or near Philadelphia shall be summoned to attend the governor, as his assistants upon that bench, and that there shall not any decree be pronounced, or made in chancery, but by the governor as chancellor, with the assent or concurrence of any two or more of the sixth eldest of the council for the time being; and that those six eldest councillors or assistants, or any of them may be employed as masters in chancery, as often as occasions shall require; and further, that a proclamation be issued certifying all his majesty's liege subjects within this province, that such a court would be opened, and held at Philadelphia, the 25th of the same month."

Accordingly, a draught of the proclamation being prepared, was laid before the said governor and council, the 9th day of August aforesaid, which was read at the board, approved of, and ordered to be engrossed, sealed and published. Which proclamation, under the great seal of the province, being laid before the house of assembly, and read there, the 16th of the said month, was by them approved of. It was afterwards published, and the governor having taken the oath of office, sat and acted as chancellor, assisted as aforesaid.

Upon this foot, the court of chancery in Pennsylvania having been established, continued to exercise jurisdiction in matters of equity, proceeding therein as near as conveniently they could, according to the known usage and practice of his majesty's high court of chancery at Westminster, nor were the proceedings of the said court complained of in any sort, or its authority called in question, until January 1735, though two acts of assembly for the establishing the courts of law in Pennsylvania have passed in that interval, and fourteen assemblies (this being the fifteenth) have been held.

Jan. 27th, 1735. Upon divers petitions gained and presented to the house of assembly, complaining that the court of chancery in this province is erected in violation of the charter of privileges, the house came to the following resolution, viz. :

"Resolved, that the court of chancery, as it is at present established, is contrary to the charter of privileges granted to the free-men of this province."

And upon conference since had between the governor and the assembly (which two alone, without the governor's council, composed the legislature in Pennsylvania), the assembly have urged from the authority of several English books, that the king, at this day, cannot, by his commission, erect a court of equity. Your opinion is desired.

Quest. 1. Whether a board of equity is not a vital and fundamental part of the English constitution, incident to, and inseparable from it, and whether the power of determining cases on bill in equity is not, by the fundamental

laws and constitution of the kingdom of England, vested in the king, as supreme magistrate, and in the chancellor acting under his appointment?

Answer. I am of opinion, that a court of equity is a necessary part of the English constitution, that relates to the administration of justice; and that the chancellor appointed by the king, or the keeper of the great seal, are, by virtue of their office, entitled to exercise that jurisdiction.

Quest. 2. Whatever courts the king may now erect by his commission within England, where all necessary courts are already in being, yet, whether King Charles the Second, could by law grant sufficient authority, by a commission under the great seal, unto William Penn and his deputies, to erect courts of equity in the province of Pennsylvania, or is it absolutely necessary that the consent of the legislature there, should be first had, in order to the erecting such courts?

Answer. I conceive King Charles the Second might, by law, grant power to William Penn and his deputies, to erect a court of equity in Pennsylvania, without the consent of the legislature there.

Quest. 3. Whether the unanimous resolution of the assembly, requesting William Keith to open and hold a court of equity for the said province, with the assistance of his council, laid before him on the 4th May 1720, his assent to that request, and establishment of the said court pursuant thereunto, by the advice of his council, the subsequent approbation of the assembly given to that establishment, and the notification thereof to the public in Pennsylvania, by written proclamation under the great seal there, may not be called an act of the whole legislature there, although not reduced into the ordinary form of a law, or, at least, may not be deemed a sufficient signification of the consent of the legislature thereto?

Answer. I conceive this is not an act of the legislature there, nor a sufficient signification of their approbation, supposing their approbation was necessary.

Quest. 4. Whether the original establishment and holding of the court of chancery, by such desire as aforesaid, after the time of William Penn's charter of privileges to the inhabitants, but before the resolve of the assembly in January 1735, can justly be construed as a violation of the 6th clause of the said charter (whatever that clause may import), seeing it was provided that the governor, and six parts in seven of the legislature, might alter that charter; or whether a proceeding heretofore before the governor and his council (not as a council of state, but as a court of chancery according to equity, and the stated rules and practice of that court), was not a proceeding in the ordinary course of justice, and consequently, within the reservation in the said 6th clause?

Answer. I conceive the establishing the court of chancery in the manner above mentioned, was no violation of the 6th clause of the charter of 1701, both, because there was the assent of the governor and six parts of seven of the assembly met; and because the proceedings in a court of equity may be justly called the ordinary course of justice.

Quest. 5. Whether, since the assembly have come to their resolution of January 1735, it will *now* be contrary to the charter of privileges, or unlawful to continue to hold the said court of chancery, notwithstanding such last-mentioned vote; or ought the court of chancery to be established there by act of assembly, and not otherwise?

Answer. I apprehend the resolution of the assembly does not make that illegal, which was not so before, and therefore, that it is not unlawful to hold the said court of chancery, notwithstanding that resolution.

(Signed)

D. RYDER.

Oct. 13, 1736.

A true copy, *ab originale.*

(Signed)

J. HAMILTON.

Mr. Attorney-General WILLES, his opinion upon the case stated relating to the court of chancery in Pennsylvania.

N. B. The case is stated in the same words as that, upon which Mr. Solicitor-General Ryder gave his opinion.

Quest. 1. Whether a court of equity is not a vital and fundamental part of the English constitution incident to, and inseparable from it, and whether the power of determining cases on bill in equity is not, by the fundamental laws and constitution of the kingdom of England, vested in the king, as supreme magistrate, and in the chancellor acting under his appointment?

Answer. It is pretty difficult to trace out the original foundation of courts, most of them having their beginning either from necessity or expedience; but it has always been held, that the power of determining cases in equity, was originally vested in the king of England, and that the chancellor only acts by virtue of a delegated power from him, being appointed at first as his assistant, when causes in equity began to be so very numerous, that the king could not dispatch them himself.

Quest. 2. Whatever court the king may now erect by his commission within England, where all necessary courts are already in being; yet, whether King Charles the Second could, by law, grant sufficient authority, by a commission under the great seal, unto William Penn, and his deputies, to erect courts of equity in the province of Pennsylvania; or is it absolutely necessary that the consent of the legislature there, should be first had, in order to the erecting such courts?

Answer. Though it is held that his majesty cannot now, by his commission, erect a new court of equity in England, where all proper courts have been long since established, yet, I am of opinion, that King Charles the Second, when he was erecting a new form of government in Pennsylvania, might, by his charter, grant to Mr. Penn and his deputies, a power to erect new courts of equity in that province, and that the consent of the legislature there was not necessary to be first had, until Mr. Penn made it so by his instrument or charter of 28th October 1701.

Quest. 3. Whether the unanimous resolution of the assembly, requesting Mr. Keith to open and hold a court of equity for the said province, with the assistance of his council, laid before him on 4th May 1720, his assent to that request, and establishment of the said court pursuant thereto, by the advice of his council, the subsequent approbation of the assembly given to that establishment, and the notification thereof to the public in Pennsylvania, by written proclamation under the great seal there, may not be called

an act of the whole legislature there, although not reduced into the ordinary form of a law, or at least may not be deemed a sufficient signification of the consent of the legislature thereto?

Answer. I am of opinion, that the unanimous resolution of the assembly 4th May 1720; what was afterwards done by Governor Keith, and his council thereupon; the subsequent approbation of the assembly; and the proclamation which issued thereupon, sufficiently established the present court of chancery, notwithstanding the clause relating thereto in the said charter of 28th October 1701; for I think that there has been a sufficient declaration of the assent of the legislature to the erecting of such court.

Quest. 4. Whether the original establishment and holding of the court of chancery by such desire as aforesaid, after the time of William Penn's charter of privileges to the inhabitants, but before the resolve of the assembly in January 1735, can justly be construed as a violation of the 6th clause of the said charter (whatever that clause may import), seeing it was provided that the governor, and six parts in seven of the legislature, might alter that charter. Or, whether a proceeding heretofore before the governor and his council (not as a council of state, but as a court of chancery according to equity, and the stated rules and practice of that court) was not a proceeding in the ordinary course of justice, and consequently, within the reservation in the said 6th clause?

Answer. I am of opinion, that neither the establishment nor the holding of the said court of chancery, after the consent of the assembly so declared as aforesaid, can be construed to be a violation of the 6th clause of the said charter. But if the governor and council, after that charter, had proceeded to hear causes in equity, without such consent of the assembly, I should have been of opinion, that it had been contrary to the said charter.

Quest. 5. Whether, since the assembly have come to their resolution of January 1735, it will *now* be contrary to the charter of privileges, or unlawful to continue to hold the said court of chancery, notwithstanding such last-mentioned vote, or ought the court of chancery to be established there by act of assembly and not otherwise?

Answer. As I am of opinion, that this court of chancery was at first legally and rightfully established, I do not think that it will be contrary to the charter of privileges, or unlawful to continue to hold the same, but am of opinion, that the same may be lawfully held 'till the whole legislature have passed an act to the contrary.

(Signed)

J. Willes.

Aug. 21, 1736.

A true copy, *ab originale.*

(Signed)

J. Hamilton.

INDEX.

The References in this Index are to the STAR * pages.

ABATEMENT.

1. What is a reasonable time to renew an action, after abatement; or to prosecute it upon the foundation of the old writ, where there has been no abatement. *Schlosser* v. *Lesher*..... *412

ACCOUNT.

See ACTION, 9.

ACTION.

1. The court will not, in one action, inquire, upon motion, into the merits of another. *Shoemaker* v. *Shirtliffe*..... *127
2. An action for money had and received, &c. is a liberal action, and will lie in all cases where, by the ties of natural justice and equity, the defendant ought to refund. *Morris* v. *Tarin*, 147; *Wallace* v. *Fitzsimmons*.. *248
3. But where a party might, with good conscience, receive the money, although he could not recover it at law, he who voluntarily paid it, cannot, in this action, compel a return. *Morris* v. *Tarin*..... ... *147
4. There is no case which gives a creditor an action against the debtor of his debtor: there is no privity between them. *Vienne* v. *McCarty*..... *154
5. A writing under seal cannot be given in evidence, to support an action of *assumpsit* upon a promissory note. *January* v. *Goodman*..... *208
6. An action will not lie in a common-law court, where the question arises from the necessary and immediate consequences of a vessel's being taken *as prize*. *Doane* v. *Penhallow*..... *218
7. In an action for money had and received, &c., the plaintiff so far confirms the defendant's act, as that he cannot gainsay the right to receive the money, and can recover no more than was actually received. *Eastwick* v. *Hugg*..... *222
8. In an action of debt brought upon a bond, and where the issue is joined on a plea of *payment*, the jury may, and ought to, presume everything to have been paid, which *ex equo et bono*, in equity and good conscience, *ought not to be paid*. *Hollingsworth* v. *Ogle*..... *260
9. In an action of *account* between partners, if these facts are proved, that a partnership existed, that the defendant was the acting partner, and that he received any part of the sum, from any of the persons mentioned in the declaration, the court will uniformly oblige him to account. *James* v. *Browne*..... *339
10. The mere sale and delivery of a promissory note, payable to *order*, without any indorsement or assignment, will not be sufficient to maintain an action brought by the purchaser in his own name. *Waters* v. *Millar*..... ... *370
11. A person whose estate was confiscated during the late war, under an act of the legislature of Connecticut, for adhering to the British government, cannot sue here to recover a debt, vested by that confiscation in the state of Connecticut, although no proceedings were had on the part of the state, to reduce the debt into possession, before the treaty of peace. *Camp* v. *Lockwood*..... *400
12. What is a reasonable time to renew an action, after abatement, or to prosecute it upon the foundation of the old writ, where there had been no abatement. *Schlosser* v *Lesher*..... *412

18. *Assumpsit* for money had and received, &c., will lie, to recover back the consideration money given for the purchase of lands, where it was obtained by fraud or imposition; and deeds or other writings which are not the immediate foundation of the suit, but only tending to it, may be given in evidence. *D'Utricht* v. *Melchor*..... *429

See ALIEN: ASSIGNMENT, 2, 4, 5: COVENANT, 3; LIS PENDENS: PRACTICE: REFERENCE, 6.

ACTS OF ASSEMBLY.

1. An act of assembly of the late province was not deemed to be repealed by the king and council, until notification here. *Albertson* v. *Robeson*..... *9
2. It is fairly to be inferred, from the general tenor of the act of assembly for the revival of the laws, that the legislature thought that the separation from Great Britain worked a dissolution of all government. *Respublica* v. *Chapman*..... *58

See BRITISH STATUTES.

ADDITION.

1. J. B. of *West* Bradford was required by proclamation to surrender, &c. by the name and addition of "J. B. of *East* Bradford township;" and it was held to be fatal. *Respublica* v. *Buffington*..... *60

ADMINISTRATOR.

1. On the plea of want of assets, in an action against an executor, by a residuary legatee, auditors shall be appointed *ex tempore*; and it is not sufficient to object, that the executor's accounts have been before settled by a reference. *Marriott* v. *Davey*..... *164
2. Payment to an executor or administrator of a deceased partner, can be no satisfaction to the survivor, who has the sole right of suing for, and of receiving the money due to the company. *Wallace* v. *Fitzsimmons*... *250
3. Although an executor, by paying money over to his co-executor, who becomes insolvent, would be chargeable, if there were creditors, and a deficiency of assets to satisfy them, yet, he is not answerable to legatees. *Brown's Appeal*..... *312
4. A creditor taking a bond from the executors or administrator of his deceased debtor, discharges the old debt. *Geyer* v. *Smith*. *347 *n*
5. Letters of administration, granted by the Archbishop of York, in England, are not a sufficient authority to maintain an action here. *Græme* v. *Harris*..... *456

See REFERENCE, 12.

ADMIRALTY.

1. The Delaware is within the admiralty jurisdiction. *Montgomery* v. *Henry*..... *49
2. A court of admiralty cannot carry an agreement into specific execution, nor give damages for the breach..... *Id*
3. The owners of Letters of Marque are responsible for injuries committed on the high seas, by the commanders sent out by them; at least to the value of the vessels. *Talbot* v. *Three Brigs*..... *95
4. In cases of capture from enemies, persons in other vessels acquire no right, merely by seeing the capture made..... *Id.*
5. In what cases, the admiralty has cognisance..... *Id.*
6. In what cases, appeals from the admiralty to the high court of errors and appeals, are regular..... *Id.*
7. The master of a ship is answerable over to his owners, where they have been obliged to pay a third person for damages sustained by his misconduct; but the court, under favorable circumstances, may reduce the *quantum* of damages below what the owners have paid. *Purviance* v. *Angus*..... *180
8. It is a wrong position, that a master of a ship is not answerable for an error in judgment, but only for a fault of the heart, in *civil* matters..... *Id.*
9. Where the question to be tried, though not directly a question of prize, is yet a question arising upon the immediate and necessary consequence of a vessel's being taken as prize, it is solely and exclusively of admiralty jurisdiction, and an action will not lie in a common-law court. *Doane* v. *Penhallow*..... *218

See DAMAGES: MASTER AND SERVANT, 1, 4.

AGENT.

1. There must be some satisfactory proof of a defendant's being actually an agent, before the court will allow him to be sworn, under the act respecting continental money, to identify the money in dispute. *Eastwick* v. *Hugg*..... *224 *n*
2. A confidential agent cannot excuse himself, on that account, from being a witness against his constituent. *Holmes* v. *Comegys*... *439

AGREEMENT.

See FRAUDS AND PERJURIES, 4: INSURANCE, 3, 4.

ALIEN.

1. An alien enemy has no right of action, during a war: but the rights which the subjects

of either power had against the other, are revived at the end of it. *Wilcox* v. *Henry*..... *71

See ACTION, 11.

AMBASSADOR.

See LAW OF NATIONS.

AMENDMENT.

1. A *sci. fa.* was amended by the record, substituting September term 1782, for December term. *Burrows* v. *Heysham*..... *133
2. Verdict in ejectment amended, by adding, "and for the residue they find for the defendant."..... *Id.*
3. The teste and return of an *alias venditioni* amended, by the attorney's precept on which it issued. *Shoemaker* v. *Knorr*..... *197
4. After report, the rule of reference was amended by the agreement filed, so as to insert the name of *Lewis*, instead of *Levis*. *Elliot* v. *Elliot*..... *379

See ERROR, 3.

APPEAL.

See ADMIRALTY, 6: DAMAGES: EJECTMENT, 8: JUSTICES, 2.

ARREST OF JUDGMENT.

See JUDGMENT, 1.

ASSAULT AND BATTERY.

1. Striking anything attached to the person, as a cane, is a battery. *Respublica* v. *De Longchamps*..... *114

See LAW OF NATIONS.

ASSIGNMENT.

1. The assignee of a bond takes it at his own peril, and stands in the same place as the obligee; so as to let in every defalcation which the obligor had against the obligee, at the time of the assignment, or notice of it. *Wheeler* v. *Hughes*..... *23
2. The only intent of the act for the assignment of bonds, &c., is to enable the assignee to sue in his own name, and prevent the obligee from releasing, after assignment.. *Id.*
3. After a *bonâ fide* assignment of a simple-contract debt, the court will not allow the nominal plaintiff to discontinue an action brought to recover it, to the use of the assignee. *McCallum* v. *Coxe*..... *139
4. The assignee of a simple-contract debt cannot maintain a suit in his own name. *Guthrie* v. *White*..... *268
5. A bond payable to L. S., with a memorandum subjoined, that it was for the use of J. P., was assigned by J. P. to J. L. And it was adjudged, that this was not an assignment, within the act of assembly; and that J. L. could not maintain an action, in his own name, against the obligor. *Cummings* v. *Lynn*..... *444
6. A subsequent assignment of the same bond, by J. L. to G. T., is no more than an assignment of J. L.'s equitable interest..... *Id.*
7. The covenant by the word *assigned*, extends only to this, that the assignee should receive the money from the obligor to his own use; or, if the obligee received it, that he would be answerable over for it to the assignee.. *Id.*

See COVENANT: DISCONTINUANCE.

ASSUMPSIT.

See ACTION, 2, 3, 5, 7, 13: PROMISSORY NOTE, 3.

ATTACHMENT.

See CONTEMPT, 3: COSTS, 4: DOMESTIC ATTACHMENT: FOREIGN ATTACHMENT.

ATTAINDER.

See ACTION, 11: TREATY.

ATTORNEY.

See LETTER OF ATTORNEY.

AUDITORS.

See ADMINISTRATOR, 1: PRACTICE, 13.

AWARD.

See REFERENCE.

BAIL.

1. Recognisance of bail binds the lands only from the date of the judgment on the *sci. fa.* against the bail, and not from the time of entering it. *Campbell* v. *Richardson*.. *131
2. The proof of a debt necessary to hold to bail. *Taylor* v. *Knox*..... *159
3. The 12 Geo. I., respecting proof of debts to hold to bail, was not in force, nor practised under, before the revolution..... *Id.*

See FOREIGN ATTACHMENT, 4: JUSTICES, 2: PRIVILEGE.

BANKRUPTCY.

1. The rational and legal construction of the 30th section of the state bankrupt act of 1785 appears to be, that no judgment-creditor, who has not levied his execution, shall receive any benefit from his judgment, as to the estate or effects of the bankrupt, vested in the commissioners of bankruptcy by the act, to the exclusion or prejudice of the creditors at large, but must be put upon the same footing with them. *Gibbs* v. *Gibbs*..... *373
2. Yet, as to liens which do not affect the general creditors, he will have the benefit of them in the same manner, as if the act had never been made..... *Id.*
3. It would defeat the express intent of the bankrupt law, if a prior judgment-creditor could come in under an execution, which, being issued upon a subsequent judgment against a bankrupt, was levied before the act of bankruptcy committed..... *Id.*
4. In that case, the creditor who sues out the execution is entitled to the money levied..... *Id.*
5. Upon a trial at law, the creditor of a bankrupt may give evidence to controvert the trading, bankruptcy, and conformity; and the certificate is not conclusive proof of all the proceedings before the commissioners. *Pleasants* v. *Meng*..... *381
6. Though the bond of the petitioning creditor is given for a debt contracted prior to the act of assembly, and with a view to take out a commission, the court would be unwilling, on that account alone, to invalidate the certificate..... *Id.* *388
7. A petition subscribed by one of two partners, in the name of himself and partner, is sufficient for the purpose of taking out a commission, on a partnership demand against the bankrupt..... *Id.* *389
8. To found a joint commission upon a fictitious partnership, is certainly *unfair* within the meaning of the act of assembly..... *Id.* *390
9. But if a partnership did exist at the time of taking out the commission, a previous assignment of the partnership effects for the payment of the creditors, or the smallness of the quantity of the goods in their store, cannot invalidate the commission, or defeat the benefit of the certificate..... *Id.*
10. *Quære.* Whether the flight of a stranger to his own home, in another state, amounts to an act of bankruptcy, within the meaning of the act of assembly?..... *Id.*

See INSOLVENT.

BILL OF EXCHANGE.

1. Where a man voluntarily pays the damages on a bill of exchange, without waiting for a protest for *non-payment*; and the defendant might with justice receive them, the money cannot be recovered back. *Morris* v. *Tarin*..... *147
2. The court, in an action on a bill of exchange, will allow the plaintiff to strike out a special, as well as a general indorsement on the bill. *Morris* v. *Foreman*..... *193
3. A protest for non-payment must appear under a notarial seal..... *Id.*
4. In an action by the *payee* against the drawer, it was held that possession of a bill of exchange was evidence of an authority to demand payment of its contents..... *Id.*
5. A bill of exchange without the words, "or order," or other words of negotiability, is not indorsible over, so as to enable the indorsee to bring an action on it, against the acceptor, in his own name. *Gerard* v. *La Coste*..... *194
6. Notice of protest ought to be given in a reasonable time; and, by not giving it, the holder takes the loss upon himself. *Steinmetz* v. *Currey*..... *234, 270
7. The reasonableness of notice of a protest must, in *Pennsylvania*, be left to the jury, as a question of fact, and not of law. *Robertson* v. *Vogle*..... *254
8. A bill of exchange, neither paid nor received in satisfaction of a precedent debt, but upon condition of its being honored, will not entitle the drawee to 20 *per cent.* damages, in case of its being protested for non-payment. *Chapman* v. *Steinmetz*..... *261

See PROMISSORY NOTE.

BOND.

See ASSIGNMENT, 1, 2, 5, 6, 7: BANKRUPTCY, 6; PAYMENT.

BRITISH STATUTES.

1. No act of parliament made in England previously to the settlement of the province of Pennsylvania, was extended here, unless by acts of assembly, adjudications of courts or established usage. *Morris* v. *Vanderen*, *67; *Respublica* v. *Mesca*..... *74–5
2. The common law of England has always been in force in *Pennsylvania*; but all statutes made since the settlement of the province, have no force here, unless the colonies are particularly named. *Morris* v. *Vanderen*..... *67

See FRAUDS AND PERJURIES: BAIL, 8: LIMITATIONS, 1, 2, 3: TRIAL, 8.

CAPTURE.

See ADMIRALTY, 4.

CARGO.

See CUSTOMS.

CERTIFICATES.

See BANKRUPTCY.

CHEAT.

See INDICTMENT.

COMMISSION.

See COSTS, 3.

COMPTROLLER-GENERAL.

1. The power of the comptroller-general in the settlement of accounts against the Commonwealth was expressly limited by the act of assembly, to claims for services performed, moneys advanced, or articles furnished, by order of the legislature, or the Executive Council. *Respublica* v. *Sparhawk*. ...*363
2. He had no right to adjudge a compensation from the state for *damages* which individuals may have suffered, in the course of military operations for the common security and defence.....*Id.*
3. Where he had no jurisdiction originally, the supreme court, on appeal from his decision, had none.....*Id.*

See SUPREME COURT, 3, 4.

CONFISCATION.

See CUSTOMS, 3, 4: UNITED STATES.

CONSIGNMENT.

See FOREIGN ATTACHMENT, 1.

CONSOLIDATION.

See REFERENCE, 6.

CONTEMPT.

1. It is a contempt of the court, to withhold a *venire*. *Keppele* v. *Williams*.....*29
2. It is a contempt, for which an attachment lies, to endeavor to prejudice the public mind, in writings respecting a cause depending in court. *Respublica* v. *Oswald*...*319
3. When the defendant is present, on a rule to show cause why an attachment should not issue against him for a contempt, the court will not make the rule absolute; but proceed to give judgment for the offence.....*Id.*

See REFERENCE, 26.

CONTINUANCES.

See LIMITATIONS, 6: PRACTICE, 14, 3.

CONTRACT.

1. In what cases, the relation of an inferior and superior officer, will bind the latter to discharge the contracts of the former. *Morris* v. *De Mars*.....*140

See COVENANT.

CONTRIBUTION.

See INTESTATE, 10, 11.

CONVEYANCE.

See DEED.

COSTS.

1. The act of assembly is positive, that, upon the reversal of a judgment in the high court of errors and appeals, each party shall pay his own costs. *Lewis* v. *Maris*.....*292
2. Costs not allowed, where the debt is reduced under 10*l.*, by a direct payment, and not by set-off on the trial. *Cooper* v. *Coats*, *308; *Bunner* v. *Neil*.....*457
3. What costs will be allowed on executing a commission. *Lynch* v. *Wood*.....*310
4. Where witnesses, upon an attachment for not obeying a *subpœna*, proved their absolute incapacity to attend, the court directed the costs of the attachment to abide the event of the suit. *Butcher* v. *Coats*.....*340
5. The jury ought to include the costs of the replevin, in their verdict, in an action brought upon the replevin-bond. *Phillips* v. *Hyde*.....*440

See PROSECUTOR, 3.

COVENANT.

1. A covenant to repair, and deliver up the demised premises in good order and repair, runs with the land, and shall bind the assignee as much as the lessee, even if the assignee were not named by express words, on account of the privity. *Pollard* v. *Shaaffer*.. .....*210
2. Covenant to deliver up the premises in good order on the 1st of March 1778, but the same being taken possession of by an alien enemy, and held until the end of the term, and afterwards: It was adjudged, that the assignee of the lease was excused from performance of this covenant; 1st, Because a covenant to deliver up the premises in good repair, against an act of God or any enemy, ought to be special and express; 2d, Because the defendant had no consideration, no premium, for the risk; and it was not in the contemplation of either party; and 3d, Because equality is equity, and the loss should be divided—he, who had the *term*, will lose the temporary profits of the

premises; and he who has the reversion, will bear the loss done to the *permanent* buildings.... .....*Id.*

3. Where there is a ground-rent deed, containing an express covenant on the part of the lessee, for the payment of rent, and he assigns over the premises; although the lessor accept rent from the assignee, covenant will lie for him against the lessee to recover subsequent rent. *Kunckle* v. *Wynick*.....*307

CURRENT MONEY.

1. *Current* and *lawful* money are synonymous. *Wharton* v. *Morris*.....*126
2. The legal currency of Pennsylvania was continental money.....*Id.*
3. A bond payable in "lawful current money of Pennsylvania" must be taken to relate to the money issued by congress.....*Id.*
4. *Current lawful money*, by the positive words of the act of assembly, means such money as is current at the time of entering into the contract. *Lee* v. *Biddis*.....*175

CUSTOMS.

1. Where the master of a vessel is obliged by law to deliver a manifest of his cargo, he does not comply, unless he exhibits a true and accurate one. *Phile* v. *The Anna* *205
2. Everything put on board of a vessel, is, generally speaking, comprehended in the description of her cargo..... ....*Id.*
3. What unlading of goods will be cause of confiscation.....*Id.*
4. The want of knowledge, or of participation of the owners, will not prevent the confiscation of a vessel, from which goods have been unladen, before a due entry at the custom-house..... ....*Id.*

DAMAGES.

1. On an appeal from the admiralty, the high court of errors and appeals, having reversed the decree of the court below, granted a rehearing upon this point, whether the high court of errors and appeals had a discretionary power with respect to damages? which was determined in the affirmative. *Purviance* v. *Angus*. *185
2. In a suit against the master of a privateer, brought by the owners of the vessel, after a recovery against them for his misconduct, in seizing a ship and cargo as prize, which were not so, the high court of errors and appeals did not make the amount paid by the owners, the measure of damages against the master but, upon some favorable circumstances ap-

pearing for him, they decreed considerably less.....*Id.*

See BILL OF EXCHANGE, 1, 8; COMPTROLLER-GENERAL, 2.

DEED.

1. *Baron and feme* joined in a conveyance of the *feme's* lands to trustees for certain uses; they afterwards acknowledged the deed before a justice of the common pleas, who indorsed upon the deed, that the *feme* was examined apart from her husband, and declared that she had voluntarily executed it, &c.: Adjudged, to be a good conveyance, upon account of the usage. *Davey* v. *Turner*, *11; *Lloyd* v. *Taylor*.....*17
2. An ancient deed, of sixty years date, allowed to be read in evidence, although possession had not gone along with it, on proof of the handwriting of one witness, who was dead, and the other not known. *Thomas* v. *Horlocker*.....*14
3. The recital of one deed in another, is evidence only against him who claims under it. *Morris* v. *Vanderen*.....*67
4. Interlineation, if made after execution of a deed, will avoid it, though in an immaterial point; and the presumption is against its having been made before.....*Id.*
5. Sheriff's deed of sale under a *vend. exp.*, read in evidence, though not recorded; the acknowledgment in court, and the registering of it in the prothonotary's office, being a sufficient recording, within the act. *Shrider* v. *Nargan*.....*68
6. Deed dated *before*, but not recorded until *after* a sheriff's deed, allowed to be read in evidence .....*Id.*
7. The court cannot hinder the reading a deed under seal; but what use will be made of it is another thing. .....*Id.*
8. J. V. devises lands unto his elder son A., in fee-tail, with remainder in fee to all his other children; and afterwards, by deed "in consideration of natural affection, he gives, grants, &c., fully, freely, absolutely, and clearly, the same premises, to his son A. V., together with all the rights, titles, interest, claim and demand whatsoever, which he then had in the said granted premises, or any part thereof, *habendum*, unto him only the said A. V., without any further condition, &c.:" Adjudged, 1st. That this deed is a covenant to stand seised to uses: 2d, That since the stat. of 27 *Hen. VIII.*, *c.* 10, no inheritance, in a covenant to stand seised to uses, or other deed to uses, can be raised, or new estate created, without the word *heirs:* and 3d, That there are no words in this deed, techni

cal or relative, that can raise a fee; so that A. V. had only an estate for life in the premises. *Vanhorn* v. *Harrison*..... *137

See COVENANT: EVIDENCE, 1, 19, 20, 25, 27, 31, 32, 46: MORTGAGE, 2: PARTNERSHIP, 1.

DEVISE.

1. Devise to the first heir male of J. S., when he shall arrive at the age of 21 years, he paying to A. and B., the daughters of J. S., 40*l.* each: after the devisor's death J. S. had a son, who attained the age of 21, and paid his sisters the 40*l.* each: Adjudged, that the testator's intent was that the first son of J. S. should take the estate. *Ashton* v. *Ashton*..... .....*4

2. Devise to trustees, to the intent, that after my wife's decease, or in case she shall marry, they should sell, and divide the money arising from the sale among the testator's children, when they severally attained the age of 21 years, or were married: Adjudged, that this was a *vested* legacy in one of the testator's children, who attained the age of 21, married, and died intestate, and without issue, in the lifetime of the widow, who never had married again, but, after whose death, the trustees sold. *Price* v. *Watkins*.....*8

3. "I devise the residue of my estate to J. P., during the term of his natural life, and if he leaves lawful issue, then I give my real estate unto such issue: but in case of his dying without issue, or they dying under 21, then I devise all my real estate unto A. J., his heirs and assigns, on condition that he, or they, pay," &c.: Adjudged, that J. P. took an estate-tail, which was forfeited by his attainder. *James's Claim*.....*47

4. The word *transfer* being used among the disabilities to which *non-jurors* are subjected by the act of assembly, a non-juror is incapable of devising lands. *Moore* v. *Few*..... *170

5. Devise of lands to the testator's son John, *when* he arrives at the age of 21 years, to hold to him, his heirs, and assigns for ever, is a *vested* devise; and in case of the death of the son, intestate, under age, unmarried, and without issue, after the death of his father, his mother surviving him, the estate devised shall not go to his eldest brother as his heir at common law, but be distributed equally among his brothers and sisters. *Anon.*, *20; *Korlin* v. *Bull*.....*175

6. T. B. begins his will, "And as to what worldly estate I am blessed with, I dispose of as followeth:" and then, he devises, 1st, "To his son J. B., a house and plantation where the testator then dwelt &c., to have and to hold unto the said J. B., his heirs and assigns for ever, he paying, &c." 2d, "To his wife M., a certain piece of land, bounding," &c. Also, he gave his wife one-third of such movable estate as should remain after the payment of his debts, funeral expenses, and legacies, which should be in lieu of her dower or thirds of his estate: and 3d, after bequeathing some legacies, he directs his house and land by the mill to be sold by his executors: Adjudged, that the wife M., had only an estate for life in the piece of land devised to her. *Busby* v. *Busby*.....*226

See DEED, 8: DOWER: INTESTATE: WILL.

DISCONTINUANCE.

1. The court refused to allow the nominal plaintiff to discontinue an action, it being proved, that it was brought in his name, for the use of another, upon a *bonâ fide* assignment of the debt. *McCullum* v. *Coxe*.....*139

DISTRESS.

See REPLEVIN.

DISTRINGAS.

See PRACTICE, 22.

DIVORCE.

See PRACTICE, 30.

DOMESTIC ATTACHMENT.

1. The auditors under a domestic attachment having made a dividend, before notice of a debt due to the commonwealth, under the circumstances of the case, the commonwealth was not afterwards entitled to full payment. *Hollingsworth* v. *Hamelin*..... ...*151

2. What constitutes an *inhabitant*, within the attachment laws. *Barnet's Case*, *152; *Taylor* v. *Knox*.....*158

3. A judgment has relation to the first day of the term, so as to exclude a domestic attachment, in favor of the judgment-creditor. *Horton* v. *Will*... .....*450

See FOREIGN ATTACHMENT.

DOWER.

1. Dower cannot be barred by a collateral recompense; the devise of anything to a wife cannot be averred to be in bar of dower, because a will imports a consideration in itself; and the devise, without other matter, is to be taken as a benevolence, and the devisee considered as a purchaser. *Kennedy* v. *Nedrow*..... ..... *417

2. The demandant in dower is not estopped from recovering therein, by an action of partition which she had before brought, for dividing lands under a devise in her husband's will, and in which it was acknowledged, that the moiety of the premises, out of which dower is claimed, belonged to the tenants. *Id.*

See DEVISE, 6: PARTITION, 4.

EJECTMENT.

1. An ejectment is almost the only action for trying the title to lands in Pennsylvania. *Morris* v. *Vanderen*..... *67
2. A bare perception of profits will not oust a tenant in common; and for the statute of limitations to bar, the possession must be adverse..... *Id.*
3. Lessor of the plaintiff shall not be obliged to show his title further back, than from the person who last died seised, first showing the estate to be out of the proprietaries, or the commonwealth. *Shrider* v. *Nargan*.... *68
4. Ejectment may be maintained in Pennsylvania, by the *cestui que trust*, in his own name. *Kennedy* v. *Fury*..... *72
5. A sheriff's deed, which did not recite the record, was allowed to be given in evidence of title, without producing the record. *Burke* v. *Ryan*..... *94
6. The defendant in ejectment must confess *lease, entry and ouster* for all the tenements laid in the declaration; confession for a part only will not be allowed. *Wilson* v. *Campbell*..... *126
7. The plaintiff in an action of trespass for mesne profits, shall not give evidence of the annual value of the premises beyond the time of the lease mentioned in the declaration in ejectment. *Shotwell* v. *Bæhm*..... *172
8. On an appeal from the regulators of party-walls, &c., the question ought to be tried by ejectment. *Wells* v. *Fox*..... *308

See LIMITATIONS, 4.

ERROR.

1. Error was assigned, that "the declaration is for the penalty in a penal bill, but omits to state that the smaller sum was not paid, so that no cause of action is shown to have accrued to the plaintiff for the penalty:" But it was *held*, that this want of an averment could not be taken advantage of on error. *Thompson* v. *Musser*..... *461
2. The court below having refused to admit the defendant to read in evidence a copy of an act of assembly of the state of Virginia, printed by the law-printers of that Commonwealth, and stitched up with a few other acts, in a blue paper cover, it was held fatal, on error brought..... *Id.*
3. It was adjudged to be error, that the court below permitted the plaintiff there to amend his declaration by the writ, after the jury had been sworn, and then had them sworn again, and received their verdict, without consent without giving the defendant leave to plead anew, and without an imparlance, or awarding the payment of costs by the plaintiff.. *Id.*

See INFANT.

EVIDENCE.

1. Copy of a deed enrolled in B. R., in England, admitted in evidence of a title to lands in Pennsylvania. *Hyam* v. *Edwards*.... *1
2. Copy from a register of births and deaths of Quakers, in England, admitted in evidence to prove the death of a person..... *Id.*
3. In partition, on the plea of *non ten. insimul*, &c., evidence may be given, that some of the defendants were not tenants of the freehold, but only tenants at will. *Bethel* v. *Lloyd*. *2
4. The exemplification of a will, made in England, and certified under the seal of the prerogative court, may be given in evidence. *Weston* v. *Stammers*..... *2
5. Minutes of the commissioners of property may be given in evidence..... *Id.*
6. The original private book of memorandums of the secretary of the land-office, respecting the description of the land originally applied for, was given in evidence, by consent, on the recommendation of the court. *Hawes* v. *McDowell*..... *5
7. The protest of a master of a ship allowed to be given in evidence. *Nixon* v. *Long*, *6; *Story* v. *Strettell*..... *10
8. A letter from the receiver-general and secretary of the land-office, to the surveyor-general's deputy, was allowed to be given in evidence, as the foundation of the defendant's title. *Fothergill* v. *Stover*..... *6
9. A survey made in pursuance of the above letter, not returned into the proper office, but found among the deputy-surveyor's land papers, many years after his death, was allowed to be given in evidence, against a regular warrant and survey of a subsequent date, a settlement and possession being proved. *Id.*
10. The votes of assembly, and minutes of council, admitted in evidence, to prove the time of the notification of the repeal of an act by the king and council. *Albertson* v. *Robeson*..... *9
11. Evidence of a parol declaration of Mr. Penn, that the land in dispute was sold to the defendant, rejected by the court. *Richardson* v. *Campbell*..... *10

12. Hearsay permitted to be given in evidence, to prove pedigree. *Strickland* v. *Poole*. *14
13. The strict rules of evidence ought not to be extended to mercantile transactions. *Riche* v. *Broadfield*.....*16
14. An account sales allowed to be given in evidence, on proof of the handwriting of the factor who signed it. ..... *Id.*
15. On plea of payment, in an action of debt on a bond, the defendant may give evidence of a mistake, or want of consideration. *Swift* v. *Hawkins*.....*17
16. No man shall create evidence for himself; therefore, letters written by the lessor of the plaintiff, to show that his grant, on which the defendant made title, was conditional, were rejected. *Proprietary* v. *Ralston*.. *18
17. The list commonly called *the list of first purchasers*, was admitted in evidence to prove a grant of 5000 acres from W. Penn, by deed, alleged to be lost. *Hurst* v. *Dippo*, *21; *Morris* v. *Vanderen*..... ...*64
18. The pass of a justice of New Jersey is not admissible in evidence, in a cause respecting the seizure of goods brought into Pennsylvania against an act of assembly. *McVeaugh* v. *Goods*.....*62
19. Any deed under seal, when proved, is proper to be given in evidence. *McDill* v. *McDill*..... *63
20. A deed sworn to by one witness before a magistrate, who certifies the same, is within the rule. *Id.; Hamilton* v. *Galloway*....*93
21. A paper copied from the books of the surveyor's office, stating that a survey had been made, was not allowed to be read in evidence; but the book from which it was taken, was admitted, without showing any actual survey. *Morris* v. *Vanderen*.....*65
22. On proof that the defendant in ejectment was in under J. P., or his heirs, the lessor of the plaintiff was allowed to give evidence of the detention of deeds by the heirs of J. P., and also to read letters written by J. P....*Id.*
23. Evidence allowed to be given of the confession of the defendant, made after the commencement of the suit.....*Id.*
24. Probate of a will in the Prerogative court of Canterbury, not recorded here, allowed to be given in evidence.....*Id.*
25. Two deeds, both executed in England, but only one of them recorded here, were allowed to be given in evidence..... *Id.*
26. A letter from a third person no way concerned in the title, was offered in evidence, to prove under whom he had possession, but refused..... *Id.*
27. Recital of one deed in another is no evidence, but against the party claiming under it.....*Id.*
28. In forcible entry, &c., title cannot be given in evidence, to prevent restitution. *Respublica* v. *Shryber*..... ...*65
29. An entry made nineteen years ago in the defendant's books, that a note of thirteen years standing was paid, was allowed to be read in evidence, to support the general presumption of payment, after such a length of time. *Rodman* v. *Hoops*.....*85
30. A book given in evidence to the jury, with a direction, that if they thought it a transcript from another book, to pay no regard to it..... *Id.*
31. A sheriff's deed allowed to be read in evidence, without producing the record. *Burke* v. *Ryan*.....*94
32. If one of two witnesses to a deed become interested, the other must be called, or proof given that he cannot be found; otherwise, the deed may not be read in evidence. *Davison* v. *Bloomer*.....*123
33. The register of a ship, certified by the naval officer under his seal of office, admitted to be read in evidence against the defendants, though the writ, with respect to the defendant that made the register, was returned *non est inventus*. *Woods* v. *Courter*..... *141
34. On an indictment for a nuisance, the defendant cannot give evidence, that the act charged is beneficial to the public. *Respublica* v. *Caldwell*.....*150
35. Parol evidence of the declaration of the grantor, amounting to a confession against himself, though made *after* the execution of a deed, may be given to the jury. *Gregory* v. *Setter*, *193; *Thompson* v. *Waite*..... *426
36. Possession of a bill of exchange is evidence of an authority to demand payment of its contents. *Morris* v. *Foreman*..... *193
37. A writing under seal cannot be given in evidence to support an action of *assumpsit* on a promissory note. *January* v. *Goodman*.*208
38. An entry in a shop-book is not evidence, to charge a man upon a collateral *assumpsit*, to pay the debt of another. *Poultney* v. *Ross*..... *238
39. When a confession is given in evidence, all that was said must be stated, and the whole, generally speaking, ought to be taken together, unless circumstances of improbability appear. *Newman* v. *Bradley*, *240; *Farrel* v. *McClea*.....*392
40. A judgment in a foreign attachment in a sister state, is not conclusive evidence of the debt, in an action here between the same parties. *Phelps* v. *Holker*..... *261
41. *Quære?* How far books are admissible (not to prove a charge against a party to the suit, but) to show a collateral fact, whether a third person was the defendant's debtor at a particular period? *Miflin* v. *Bingham*.*276

12. In order to prove that the goods in question were bought of a third person, and not of the plaintiff, the entry in the books of the third person must be shown: his clerk's swearing that he had made it, will not be admitted. *Keely* v. *Ord*.....*310
13. The *procès verbal* delivered into the Admiralty at a foreign port, was not admitted to be read in evidence, in an action against the underwriters. *Richelle* v. *Stewart*.....*317
14. The protest of a master of a vessel, made at a distant day, and not at the first port of arrival, was refused to be admitted in evidence..... *Id.*
15. A special verdict in another action upon the same policy, but against different underwriters, was allowed to be read in evidence, upon proof of an agreement of all the underwriters, to be bound by one verdict. *Patton* v. *Caldwell*.....*419
16. In what cases, parol testimony is proper to be admitted, to explain and control the operation of a deed. *Thompson* v. *White*..*426
17. In an action of *assumpsit* for money had and received, deeds and other writings, which are not the immediate foundation of the suit, but only leading to it, may be read in evidence. *D' Utricht* v. *Melchor*.....*428
18. A printed copy of an act of assembly of Virginia, printed by the law-printers there, and stitched up, with a few other acts, in a blue paper cover, is good evidence to be read to a jury. *Thompson* v. *Musser*.....*462

See BAIL, 2, 3: DEED, 2, 5, 6, 7: EJECTMENT, 5: GRAND INQUEST: TREASON, 3, 4, 5, 6.

EXECUTION.

1. Execution cannot issue upon a judgment confessed on a bond by warrant of attorney, until the time given for payment of the bond is elapsed. *Shoemaker* v. *Shirtliffe*.....*133
2. A person committed in execution by a justice for a debt exceeding 10*l.*, discharged on a *hab. corp.* *Geyger* v. *Stoy*.....*136
3. A person attending court is not privileged from being arrested on a *ca. sa.* *Starret's Case*..... *356
4. A prior judgment-creditor, cannot come in under an execution, issued upon a subsequent judgment against a bankrupt, and levied before an act of bankruptcy: but the plaintiff in the execution shall have the money. *Gibbs* v. *Gibbs*.....*373
5. There is nothing in the act of assembly, which precludes the sheriff from holding an inquest, after the return of a *fi. fa.* *Weaver* v. *Lawrence*..... *379
6. When the judgment of a justice of the peace is affirmed, upon a removal into the supreme court, execution may issue at once, without referring the cause again to the justice. *Robbins* v. *Whitman*.....*410
7. Lands of an intestate are bound for the payment of his debts, and may, for that purpose, be taken into execution, although the heir may have previously sold and conveyed them to a *bonâ fide* purchaser. *Graff* v. *Smith*..... *481

See BANKRUPTCY, 3, 4: INTESTATE, 9.

EXECUTOR.

See ADMINISTRATOR.

EXTINGUISHMENT.

See PAYMENT, 2, 7.

FORCIBLE ENTRY AND DETAINER.

1. In an indictment for forcible entry and detainer, title cannot be given in evidence to prevent restitution. *Respublica* v. *Shryber*..... *68
2. Wife of the prosecutor in an indictment for forcible entry and detainer may be a witness to prove the force, but only the force.... *Id.*
3. Motion in arrest of judgment:—1st. That the indictment of forcible entry, &c., stated that "the prosecutor *was seised* in his demesne as of fee," without saying *when:* 2d. That the indictment stated, that "he was *seised* in his demesne as of fee," and "that his *possession* thereof as aforesaid, continued until, &c." which was repugnant: But both objections were overruled.....*Id.*
4. The proceedings on an inquisition of forcible entry, &c., were quashed, because the defendant was stated in the inquest to have been *possessed*, but no estate or term was laid. *Respublica* v. *Campbell*..... ...*354

FOREIGN ATTACHMENT.

1. Goods consigned to be sold on account of the consignor, and to be applied first to the payment of a debt due to the consignee, are not liable to a foreign attachment, until the consignee is satisfied. *Stevenson* v. *Pemberton*.. ..... *3
2. Property of a sister state is not liable to an attachment in Pennsylvania, for a debt due from such state to an individual. *Nathan* v. *Virginia*..... *77 n
3. A man who comes from another place to reside amongst us, introduces his family here, takes a house, engages in trade, contracts debts, and, after some time, runs away, with design to defraud his creditors, is such an *inhabitant* as not to be an object of the foreign attachment, but of the domestic attachment. *Barnet's Case*..... .....*152

4. The court will inquire into the cause of action, in the case of foreign attachments, as they do in the case of a *capias*. *Vienne* v. *McCarty*, *154; *Doane* v. *Penhallow*..*219
5. What constitutes an *inhabitant*, within the meaning of the attachment laws. *Taylor* v. *Knox*.....*158
6. What proof of a debt is sufficient, in a foreign attachment, upon a citation to show the cause of action..... *Id.*
7. After judgment has been regularly entered in a foreign attachment, *it seems*, that it is too late to move to quash the writ. *Whiteside* v. *Oakman*.....*294
8. Money paid into the hands of the prothonotary, was attached by the defendant, as soon as he paid in; but, on motion, the attachment was quashed. *Ross* v. *Clarke*..*354
9. In executing a writ of inquiry upon a judgment in a foreign attachment, the defendant is not entitled to produce evidence to the jury. *McClenachan* v. *McCarty*.....*377
10. A shallop attached was directed to be sold as a chargeable commodity, upon motion, and positive affidavit of the debt, at the first term. *O'Niel* v. *Chew*..... *379
11. A foreign attachment will not lie against an inhabitant of the state, though avowing an intention to emigrate, and actually on his journey for that purpose. *Lyle* v. *Foreman*.....*480

See DOMESTIC ATTACHMENT: EVIDENCE: JUDGMENT.

FRAUDS AND PERJURIES.

1. The English statute of frauds and perjuries, 29 *Car. II.*, *c.* 3, does not extend to Pennsylvania. *Anon*.....*1
2. But that statute is supplied by an act of assembly passed 12 *Geo. II.*, *c.* 31..... *Id.* n
3. The act was made to prevent frauds as well as perjuries; it should be construed liberally, and beneficially expounded for the suppression of cheats and wrongs. *Thompson* v. *White*.....*427
4. An engagement that if D. S. would make a conveyance to L. S., he would reconvey to a third person, although not in writing, and concerning lands of inheritance, is not, under the particular circumstances of the case, void by the act of assembly..... *Id.*

See EVIDENCE, 35.

FREEHOLDER.

See PRACTICE, 11, 20, 25, 36: PRIVILEGE, 1, 6, 8.

GOVERNMENT.

1. It is fairly to be inferred from the general tenor of the act for the revival of the laws, that the legislature thought the separation from Great Britain worked a dissolution of all government. *Respublica* v. *Chapman*..*53
2. A formal compact is not a necessary foundation of government..... *Id.*
3. A kind of government independent of Great Britain, was administered in Pennsylvania before the establishment of its present constitution..... *Id.*
4. The constitution of Pennsylvania was a dissolution of the government so far as related to the powers of Great Britain; but not in relation to the powers which had been before exercised by councils and committees....*Id.*
5. When treason may be committed against a government..... *Id.*
6. *Subject* means being in subjection to some sovereign power, and is not barely connected with the idea of territory; it refers to one who owes obedience to the laws, and is entitled to partake of the elections into public office..... *Id.*

See UNITED STATES.

GRAND INQUEST.

1. It is improper and illegal, to examine witnesses on behalf of the defendant, while the charge against him lies before the grand jury. *Respublica* v. *Shaffer*..... *236

GROUND-RENT.

See COVENANT, 3.

GUARDIAN.

See ORPHANS' COURT.

HIGH COURT OF ERRORS AND APPEALS.

See DAMAGES.

INDICTMENT.

1. An indictment will lie for a cheat of such a nature as may prejudice, although it does not charge that any person was actually defrauded. *Respublica* v. *Sweers*..... *41
2. An indictment lies against a public officer, for a cheat in marking barrels of bread as of the weight of 88 lbs. each, when, in fact, they only weighed 68 lbs.....*Id.*
3. An indictment lies for "maliciously, wilfully, and wickedly killing a horse." *Respublica* v. *Teischer*..... *335

See NUISANCE: TREASON, 1, 7, 8.

INFANT.

1. The appearance of an infant to a suit brought against him, is not a judicial act, and will be fatal on a writ of error. *Sliver* v. *Shelback*.....*166
2. A judgment against an infant may be reversed, after full age, except in cases of real actions, and fines and recoveries, which are, in their operation, mere modes of assurance; and the fact must be tried *per pais*, and not by inspection.....*Id.*

See Orphans' Court, 1.

INFORMER.

See Prosecutor, 3.

INHABITANT.

See Domestic Attachment: Foreign Attachment: Privilege, 1, 6.

INQUEST.

See Execution, 5: Foreign Attachment, 9: Writ of Inquiry.

INSOLVENT.

1. Practice of the courts, on an application to be discharged under the insolvent laws, *Mifflin* v. *Gaspin*, *142; *Henderson* v. *Allen*.....*149
2. A discharge of the defendant from imprisonment, in New Jersey, by virtue of the general insolvent laws of that state, was held not to entitle him to a similar discharge in this state, although the debt was contracted in New Jersey. *James* v. *Allen*.....*188
3. Where a debt had been contracted in Maryland, where the defendant resided, but the plaintiff was a citizen of Pennsylvania, it was held, that a discharge under an insolvent law of Maryland, in nature of a general bankrupt law, entitled the defendant to an *exoneretur* in Pennsylvania. *Millar* v. *Hall*, *229; *Thompson* v. *Young*.....*294
4. Effect of an inchoate proceeding in a French court. *Gorgerat* v. *McCarty*.....*366

See Bankruptcy.

INSURANCE.

1. The defendant underwrote an open policy on a vessel from Philadelphia to Jamaica; she was taken by the enemy, and afterwards retaken and carried into Jamaica; where, by agreement between the captors and recaptors, without going into the court of admiralty, she was sold at public sale for one-fourth of the sum insured, and bought by the master for the original owners, who afterwards acquiesced in the purchase, and now sued for the whole sum insured as a total loss: but, agreeable to the directions of the court, the jury only allowed a compensation for salvage, charges, and loss of time. *Story* v. *Stretell*.....*10
2. A warranty that "orders will be given that the ship shall not cruise," is not complied with unless such orders are expressly given to the master; an implication from the general instructions will not do. *Ogden* v. *Ash*.....*162
3. An agreement entered into by underwriters to be bound by one verdict, is equally binding on the parties, whether made in person, or by a broker mutually employed. *Patton* v. *Caldwell*.....*419
4. All such agreements ought first to be entered on the records of the court.....*Id.*

See Evidence, 45.

INTEREST.

1. Where money is received, as well as paid, in a mistake, and neither fraud nor surprise can be imputed to either party, interest will not be allowed, in an action to recover the money back. *Jacobs* v. *Adams*.....*52
2. The rule for computing interest on partial payments. *Tracy* v. *Wilcoff*, *124; *Penrose* v. *Hart*.....*378
3. Interest will not be allowed upon an open account for goods sold and delivered. *Henry* v. *Risk*, *265; *Williams* v. *Craig*.....*315
4. Money received for another, and retained without the owner's consent, ought to carry interest. *Rapalje* v. *Emory*.....*349

See Usury.

INTESTATE.

1. J. F., having two sons and a daughter, devised a plantation to Mathias in fee; Mathias died in his minority, intestate, and without issue: *Ruled*, that the plantation should not go to the heirs of Mathias at common law, but be divided among his brothers and sisters, under the supplemental intestate law. *Anon.*, *20; *Kerlin* v. *Bull*.....*175
2. Where the heir-at-law takes an intestate's lands at a valuation, the orphans' court ought, instead of bonds, which are a mere personal security, to take his recognisance, by which the lands themselves would be bound for the payment of the distributive shares. *Walton* v. *Willis*.....*265
3. The eldest son of the eldest son of an intestate, is entitled to an estate which cannot

be divided, at the valuation, in the same manner as his father. *Walton* v. *Willis* *353
4. And the adjudication is not to be to all the children of the eldest son, but to his eldest son, who is alone his heir at common law. *Id.*
5. In partition of an intestate's estate, the decree of the orphans' court was reversed, because no provision was made for a tenant by the curtesy of his wife's share..... *Id.*
6. Where the purparts of the valuation money, at which the heir-at-law takes an intestate's real estate, are not specified, nor the time of payment fixed, the sentence of the orphans' court is not sufficiently certain..... *Id.*
7. But, on appeal, the supreme court might reduce both those points to certainty; and in that case, the whole costs of the appeal would fall on the defendant..... *Id.*
8. Where an heir-at-law offers to take an intestate's real estate, at a valuation, the fee in the premises is not vested in him, if he has neither paid, nor secured the payment of, the valuation money to those who are entitled to receive it..... *Id.*
9. Upon the death of a man, intestate, his lands are bound for the payment of his debts, in such a manner, that they may be taken in execution and sold, notwithstanding the heir may have previously sold and conveyed the same, to *bonâ fide* purchasers. *Graff* v. *Smith*..... *481
10. And in such case, the purchaser from one heir is bound to contribute in aid of the other heirs, whose lands remain unsold..... *Id.*
11. But *quære?* whether purchasers under an order of the orphans' court, are likewise bound to contribute?..... *Id.*

JUDGES.

See JUDGMENT, 2.

JUDGMENT.

1. Motion in arrest of judgment:—1st. That in an indictment of forcible entry, &c., it was stated, that "the prosecutor was *seised* in his demesne as of fee," without saying *when;* 2d. That he was *seised* in his demesne as of fee, and that "his peaceable *possession* thereof as aforesaid continued, until," &c., which was repugnant: but both objections were overruled. *Respublica* v. *Shryber*..... *68
2. Judges are not bound to assign any reasons for their judgment, and when they do, it is always in public. *Respublica* v. *Dunn*.. *89
3. Judgment confessed by warrant of attorney, executed by one partner, in the name of both, set aside as to the partner who did not sign the warrant, and confirmed as to the partner that did. *Gerard* v. *Basse*..... *119
4. A judgment obtained in a foreign attachment, in a sister state, is not conclusive evidence of the debt, in an action between the same parties here. *Phelps* v. *Holker*. *261
5. Where judgment may, or may not, be entered in the supreme court, by warrant of attorney. *Kirkbride* v. *Durden*..... *287
6. After judgment by default, the defendant may give evidence to the jury, on executing a writ of inquiry; but not after judgment in a foreign attachment. *McClenachan* v. *McCarty*..... *369
7. A judgment has relation to the first day of the term, so as to exclude a domestic attachment, in favor of the judgment-creditor. *Horton* v. *Will*..... *450
8. If the verdict is good, a judgment entered upon it, generally, must be so, likewise; for, when it is drawn at large, it may be put into form. *Thompson* v. *Musser*.....*462

See BAIL, 1: BANKRUPTCY, 3: INFANT, 2: JUSTICE, 4: SUPREME COURT, 1, 2: WARRANT OF ATTORNEY.

JURY.

See TRIAL, 3.

JUSTICE OF THE PEACE.

1. A prisoner in execution on a justice's warrant, for a sum exceeding 10*l.*, was discharged on a *habeas corpus*. *Geyger* v. *Stoy*..... *135
2. After appeal, and security given, a justice cannot issue an execution against the defendant, but must proceed against the bail, upon the recognisance. *Plowman* v. *Abrams*. *316
3. The judgment of a justice was reversed, 1st, Because the summons was returnable on the next day, whereas, the act requires that there should be allowed a time not less than five, nor exceeding eight days; and 2d, because the summons was to answer a debt under forty shillings, and the judgment was for a greater sum. *Pinchin* v. *Fry*..... *405
4. The defendant, after judgment is given against him by a justice, ought to enter into a recognisance *instanter*, with, at least, one good surety: he may afterwards withdraw his security, or appeal within six days. *Calvert* v. *Pitt*..... *40

JUSTIFICATION.

See NUISANCE.

LAW OF NATIONS.

1. The law of nations is a part of the municipal law of Pennsylvania. *Respublica* v *De Longchamps*..... *114

2. To insult a secretary to the legation in the house of the minister plenipotentiary, is a violation of the law of nations, punishable by fine and imprisonment..... *Id.*
3. But a person convicted of that offence, although claimed as a subject of a foreign power, cannot be given up on such claim: but cases may occur, where, *pro bono publico*, offenders may be delivered up to the justice of the country from which they endeavor to escape..... *Id.*
4. Nor can the person so convicted be imprisoned, until the sovereign, whose officer was insulted, shall declare that the reparation is satisfactory; for punishments must be certain and definite in all respects..... *Id.*
5. The person, house and *comites* of a minister, are all protected by the law of nations... *Id.*

See ALIEN: UNITED STATES.

LEGACY.

See ADMINISTRATOR, 1.

LETTER OF ATTORNEY.

1. Where a special letter of attorney was given to institute a suit, and afterwards, a person having a general power, executed a release to the defendant in the suit, the court held the authority to be sufficient, and discharged the party. *Quesnel* v. *Musey*.....*449

LIMITATIONS.

1. The stat. of limitations, 32 *Hen. VIII.*, *c.* 2, extends to Pennsylvania. *Boehm* v. *Engle*, *15; *Morris* v. *Vandcren*.....*67
2. So does the 21 *Jac. I.*, *c.* 16. *Biddle* v. *Shippen* *19
3. But the 32 *Hen. VIII.*, *c.* 9, does not extend. *Morris* v. *Vanderen*.....*67
4. For the statute of limitations to bar an ejectment, the possession must be adverse. *Id.*
5. The court will never open a regular judgment, to let in a plea of the statute of limitations. *Brown* v. *Sutter*.....*239
6. It is only necessary to enter the continuances, in order to prevent the bar of the statute of limitations, where the writ and declaration disagree as to the nature of the action. *Schlosser* v. *Lesher*..... *411

LIS PENDENS.

1. Before the return of the writ, the plaintiff moved for a special court; but it was held, that the action was not depending for that purpose, until the writ was returned. *McCarty* v. *Nixon* *77

MARINERS.

See MASTER AND SERVANT, . 4.

MASTER AND SERVANT.

1. Upon a general retainer, for no particular voyage, the owners of a vessel may dismiss the master, at any time, without cause assigned; but where there is a charter-party, bills of lading, and a particular voyage agreed upon, though the owners may dismiss the master, yet they would be liable in a court of common law. *Montgomery* v. *Henry*.. *49
2. As villeinage never existed in America, no part of the doctrine founded upon that condition, is applicable here. *Pirate* v. *Dalby* *167
3. Property in a negro may be obtained by a *bonâ fide* purchaser, without deed..... *Id.*
4. The master is liable for the wages of mariners, if he admit them to serve on board the vessel, although they were originally shipped by the owner. *Farrel* v. *McClea*.. ...*392
5. A negro born before the first of March 1780, to wit, in 1779, and not recorded agreeable to the act for the gradual abolition of slavery, cannot, under that act, be held as a servant until she is 28 years of age, but is absolutely free. *Respublica* v. *Betsey*.....*469

See ADMIRALTY, 3, 7: CUSTOMS, 4.

MEDIETAS LINGUÆ.

See TRIAL, 3.

MESNE PROFITS.

See EJECTMENT, 7.

MORTGAGE.

1. A subsequent simple-contract debt cannot be recovered on a *scire facias* upon a prior mortgage; but only the principal, interest and costs; on payment of which, the court will stay the proceedings on the *sci. fa.* *Dorrow* v. *Kelly*.....*142
2. A mortgage, though not recorded within six months, is good against the mortgagor; the deed, so far, is sufficient to pass the lands; and under it, the possession of the premises might have been recovered in ejectment. *Levinz* v. *Will*.....*430
3. A mortgage, acknowledged and recorded the day after the declaration of Independence, by officers appointed under the proprietary government, was, nevertheless, held to be valid against a subsequent judgment-creditor, and

bonâ fide purchaser, for a valuable consideration. *Parker* v. *Wood*..... .....*436

See PAYMENT, 7.

NEGROES.

See MASTER AND SERVANT, 2, 3, 5.

NEW TRIAL.

See TRIAL, 7.

NON-JUROR.

See DEVISE, 4.

NOTICE.

See BILLS OF EXCHANGE, 6, 7.

NUISANCE.

1. It is no justification, on an indictment for a nuisance, by intruding on the public property, that it is beneficial to the public. *Respublica* v. *Caldwell* *150

ORPHANS' COURT.

1. The Orphans' Court have a power to assign the guardianship of minors, under 14 years of age, to whom they please, and are not confined to the guardian in soccage or by nurture. *Graham's Appeal*.....*136
2. Where an heir-at-law takes an intestate's lands at a valuation, the orphans' court ought, instead of bonds, which are a mere personal security, to take recognisances, by which the lands themselves would be bound for payment of the distributive shares. *Walton* v. *Willis*.....*265

See INTESTATE: PARTITION.

OUTLAWRY.

See ADDITION.

PAROL TESTIMONY.

See EVIDENCE, 11, 35, 46.

PARTITION.

1 Although it would be proper for the party praying for a partition of an intestate's real estate, to be particular in the names of the persons entitled to shares, and of the purparty of each; yet the court would not reverse an inquest for omitting this. *Walton* v. *Willis*..... .....*351

2. The decree of the orphans' court was reversed, because in partition of an intestate's estate, no provision was made for a tenant by the curtesy of his wife's share..... *Id.*
3. The practice in the orphan's court has been to direct the same inquest which is appointed to make a partition of real estate, if that cannot be done, without prejudicing the whole, then to make the valuation....*Id.*
4. Where a recovery in partition is no bar to an action of dower, in that moiety of the premises, which is assigned to the tenant. *Kennedy* v. *Nedrow*.....*418

See DOWER, 2: INTESTATE, 5: ORPHANS' COURT, 2.

PARTNERSHIP.

1. One partner cannot bind another, by executing a deed under the firm name. *Gerard* v. *Basse*.....*117
2. Not only the ship's husband, but all the real owners at the time of the work done, are liable to the tradesmen. *Scottin* v. *Stanley*...*129
3. Payment to an executor or administrator of a deceased partner, can be no satisfaction to the survivor, who has the sole right of suing for, and of receiving the moneys due to the company. *Wallace* v. *Fitzsimmons*. ...*248
4. Articles of copartnership being *res inter alios acta*, the limitations cannot be known, and therefore, ought not to affect a third person, who acts under a legal authority from one of the partners. *Tillier* v. *Whitehead*.....*269
5. One of two partners may give an authority to a clerk under the firm name of the house; and the clerk may, in consequence thereof, accept bills, and sign or indorse notes, in the name of the company.....*Id.*

See ACTION, 9: BANKRUPTCY, 7, 8, 9: JUDGMENT, 3.

PARTY-WALL.

1. The reimbursement of the cost of the moiety of a party-wall, is only a personal charge against the builder of the second house, and not a lien upon the house itself. *Inglis* v. *Bringhurst*..... .....*341

PAUPER.

1. It is not necessary that an examination should appear, upon an order of sessions for the removal of a pauper. *Fallowfield* v. *Marlborough*..... ...*28
2. If a pauper was injured by removal, a remedy may be had by information.....*Id.*

PAYMENT.

1. Under the plea of payment, mistake, or want of consideration, may be given in evidence. *Swift* v. *Hawkins*, *17; *Hollingsworth* v. *Ogle*.....*25
2. A bond given in payment of a precedent debt, is conclusive evidence of the contract, to prevent the obligor's claim of paying by instalments, under the act of assembly. *Snowden* v. *Hemming*.....*83
3. Partial payments, a rule for crediting them. *Tracy* v. *Wikoff*, *124; *Penrose* v. *Hart*.....*379
4. Payment to an executor or administrator of a deceased partner, is no satisfaction to the survivor, who has the sole right of suing for, and receiving the moneys due to the company. *Wallace* v. *Fitzsimmons*.....*248
5. In an action of debt upon a bond, and where the issue is joined on a plea of payment, the jury may, and ought, to presume everything to have been paid, which, *ex æquo et bono*, ought not to be paid. *Hollingsworth* v. *Ogle*.....*257
6. Money paid into the hands of the prothonotary upon a judgment, is to be considered in the same estate as if paid to the sheriff; and is not liable to be attached by the person who paid it, on a suggestion that the debt may have been otherwise satisfied. *Ross* v. *Clarke*.....*354
7. When a bond shall not be considered as payment, or extinguishment, *pro tanto*, of money due upon a mortgage. *Hamilton* v. *Callender*.....*423

See CURRENT MONEY: ADMINISTRATOR, 2, 3: EVIDENCE, 29.

PLEADING.

See PRACTICE.

POLICY.

See INSURANCE.

PRACTICE.

1. Where the defendant has shown title in a third person, he may take the opinion of the court on that title, by motion for a *nonsuit*, before he has gone through all his evidence. *Proprietary* v. *Ralston*.....*18
2. In such case, the plaintiff cannot demur to the defendant's evidence, until he has gone through the whole.....*Id.*
3. When a deed is produced in evidence, it must be shown *in hæc verba*, upon demurrer. *Hurst* v. *Dippo*.....*20
4. Whenever a writ issues fairly, if delivered first, it shall take preference. *Steiner* v *Fell*.....*22
5. The proceedings on a *hab. corp.* are *de novo*, but on a *certiorari*, the court proceed on the state returned.....*Id.*
6. *Fi. fa.* issued on a judgment in the bail-bond suit: proceedings were stayed, on affidavit of a defence, pleading issuably in the original action, and consenting that the judgment on the bail-bond should remain as a security *Carrew* v. *Willing*..... *130
7. To entitle the plaintiff to judgment by default, the service of a summons, *on the person* of the defendant, as well as if left at his house, must be ten days before the return. *Case* v. *Hufty*.....*154
8. On affidavit that material witnesses for the defendant (who was in confinement) were about to leave the state, the court granted a rule to take their depositions, though the writ was not returnable until next term. *Stotesbury* v. *Covenhoven*, *164; *Schlosser* v. *Lesher*.....*251
9. An attorney's agreement to refer binds his client. *Somers* v. *Balabrega*.....*164
10. The defendant, by mistake of his attorney, had notice of trial for the 17th, instead of the 13th, and not appearing on the 13th, judgment was entered by *non sum informatus*; but afterwards, on proof of the mistake, the judgment was opened. *Jackson* v. *Vanhorn*.....*241
11. Although the words that "the defendant has not been *resident* in the state for twelve months before the writ issued," are inserted in an affidavit to found a *capias* against a freeholder, yet the court will inquire into the circumstances of the case, and relieve him from arrest, if they think he was *intended* by the act to be exempted. *Penman* v. *Wayne*.....*241
12. A third person, fully acquainted with the circumstances, is admissible to make the affidavit of a defence, when the party himself, from extreme sickness, is incapable of making it. *James* v. *Young*.....*248
13. Auditors will be appointed only where there is a dispute about the depreciation. *Cooper* v. *Coates*.....*248
14. The plaintiff, after stating the want of a material witness, who had been *subpœnaed*, put off the trial; but the court, notwithstanding, granted the defendant a rule for trial next term or *non pros.* *Schlosser* v. *Lesher*.....*251
15. It is an invariable rule, not to appoint referees, but in the presence of both parties. *Shippen* v. *Bush*.....*251
16. The court will grant a rule to take the de-

positions of going witnesses, *de bene esse*, before the return of the writ. *Gilpin* v. *Semple*.....*251

17. After judgment has been regularly entered in a foreign attachment, it is too late to move to quash it. *Whiteside* v. *Oakman*.....*294

18. On an appeal from the determination of the regulators of party-walls, &c., a feigned issue can only decide, whether the regulators have done right or not; it cannot decide the title and finally settle the matter; and therefore, it is proper to try the question by ejectment. *Wells* v. *Fox*.....*308

19. The privilege of a freeholder to be sued by summons, extends to actions of trespass *vi et armis*. *Hudson* v. *Howell*.....*310

20. The rule is, that unless exceptions to the report of referees are filed within four days, the judgment *nisi* becomes absolute. *Shewell* v. *Wycoff*.....*312

21. A *distringas* will lie against a sheriff *while in office*, upon a return of levied to the value, &c., but under particular circumstances, it would be hard to issue it, without moving the court. *Zane* v. *Cowperthwaite*.....*312

22. The *venue* was laid in Philadelphia county, and judgment being there obtained, execution was immediately issued into Bucks; but upon motion, the writ was quashed, the court being of opinion, that the plaintiff ought to have proceeded by *testatum*. *Lesher* v. *Gehr*.....*330

23. On a rule for trial or *non pros.*, the *non pros.* must be moved for in court; it cannot be signed in the prothonotary's office. *McKegg* v. *Crawford*.....*347

24. A *capias* will not lie against a freeholder, although the attorney directs his appearance to be accepted. *Barnard* v. *Field*.....*348

25. Rule to refer and report to *next term;* after the next term, the referees were changed by consent, and report returnable *into office:* Determined, that the rule to report to *next term* was expired by its own limitation. *Abbot* v. *Pinchin*.....*349

26. On motion, and positive affidavit of the debt, at the first term, a shallop attached under a *foreign attachment*, was ordered to be sold as a chargeable commodity. *O'Niel* v. *Chew*.....*379

27. It has been the practice for the sheriff to hold an inquest, as well after as before the return of a *fi. fa.* *Weaver* v. *Lawrence*. *379

28. Rule for trial or *non pros* but afterwards a plea added, and particular facts referred: It was ruled, that, by this, the rule for trial or *non pros.* was virtually vacated. *Halhead* v. *Ross*.....*405

29. On a libel for divorce, notice ought to be given that, between two specific dates, acts of cruelty, &c., were intended to be proved. *Steele* v. *Steele*.....*409

30. Rule for trial or *non pros.* in *September* term, and notice at bar; and the cause continued generally until *January* term: It was determined, that the rule for trial, or *non pros.* was continued; and that no new notice was necessary. *Smith* v. *Davids*.....*410

31. Upon affirmance of a judgment, in a cause removed by *certiorari* from before a justice of the peace, execution may issue at once out of the supreme court. *Robbins* v. *Whitman*.....*410

32. It is only from the disagreement of the writ with the declaration, that it becomes necessary to enter the continuances, to show it issued for the same cause of action, in order to prevent the bar of the statute of limitations. *Schlosser* v. *Lesher*.....*411

33. The writs of *capias* and *summons* in Pennsylvania always specify the nature of the actions to be declared in, and are, therefore, similar, in respect of entering continuances, to the *originals* out of chancery and the *attachments of privilege* in the common pleas... *Id.*

34. What is a reasonable time to renew an action; or to prosecute it upon the foundation of the old writ, where there has been no actual abatement.....*Id.*

35. Judgment before a justice of the peace is sufficient to defeat a freeholder's privilege of being sued by summons. *Quesnel* v. *Mussi*.....*436

36. The practice of entering verdict on the issue of *non solvit*. *Thompson* v. *Musser*....*462

See ASSIGNMENT, 3: CONTEMPT, 3: DISCONTINUANCE: ERROR, 3: FOREIGN ATTACHMENT, 4, 7, 9, 10: JUDGMENT: JUSTICE: LIS PENDENS, &c.: PARTITION, 1–3: PRIVILEGE, 1: TREASON, 1.

PRIORITY.

1. When the commonwealth is not entitled to a priority. *Hollingsworth* v. *Hamelin*....*150

See BANKRUPT, 1, 2, 3: DOMESTIC ATTACHMENT, 1: JUDGMENT, 7.

PRIVILEGE.

1. Though the affidavit to ground a *capias* against a freeholder contains the words, that "he has not been *resident*, &c.," the court are not precluded, and will inquire into the circumstances of the case, in order to ascertain whether the non-residence comes within the meaning of the act of assembly. *Penman* v. *Wayne*.....*211

2. A lieutenant of another county who comes to Philadelphia, to take out the commissions of

some militia officers, is not privileged from arrests while here. *Morgan* v. *Eckert*..*295
3. A sheriff elect who comes from another county to solicit council for his appointment, is not privileged from arrests while here. *Morgan* v. *Bower*.....*295
4. A member of assembly, or of a state convention, is privileged from being arrested, or served with a summons, during the sitting of the assembly or convention. *Bolton* v. *Martin*.....*296
5. A consul, residing abroad, and having entered into partnership with another person, is not privileged from being sued. *Caldwell* v. *Barclay*.....*305
6. A freeholder who quits the state for a particular purpose, *animus revertendi*, leaving his family behind him, does not lose his privilege of being sued by summons. *Barnard* v. *Field*.....*348
7. A person attending court is not privileged from being arrested upon a *ca. sa.* *Starrett's Case*.....*356
8. Judgment before a justice of peace is sufficient to defeat a freeholder's privilege of being sued by summons. *Quesnel* v. *Mussi*.....*436

PROMISSORY NOTE.

1. A writing under seal cannot be given in evidence, in an action of *assumpsit* on a promissory note. *January* v. *Goodman*.....*208
2. Where there are subscribing witnesses to a promissory note, they must be produced, or some account given of them at the trial...*Id.*
3. Sale and delivery of a promissory note, by the payee, without any indorsement or assignment, is not, of itself, a legal ground of *assumpsit*, to enable the purchaser, in his own name, to sue the maker. *Waters* v. *Millar*...*369
4. The indorsee of a promissory note, takes it subject to all equitable considerations, to which the same was subject, in the hands of the indorser, the original payee. *McCullough* v. *Houston*.....*441

See Bill of Exchange.

PROPERTY.

1. What acts will amount to a change, or transfer, of the property in goods. *Dutilh* v. *Ritchie*.....*171

See Foreign Attachment, 1, 2: United States, 2.

PROSECUTOR.

1. The act of assembly does not intend that a prosecutor should be indorsed on all indictments; but only where a prosecutor really exists. *King* v. *Lukens*.....*5
2. The defendant is not a competent witness to prove the person prosecuting, it must be proved by indifferent witnesses.....*Id.*
3. The judge who tries the cause, not being authorised by the act of assembly to certify, so as to exempt the informer from costs, he cannot do it. *Rapp* v. *La Blanc*.....*68

PROTEST.

See Bill of Exchange.

PURCHASE.

1. The word *purchase*, implies a purchase in fee. *Hurst* v. *Dippo*.....*21

RECITAL.

See Deed, 3.

RECOGNISANCE.

See Bail, 1: Orphans' Court, 2.

RECORDS.

See Mortgage, 2, 3.

REFERENCE.

1. Notice of the time and place of the meeting of referees, must be served on the party, not his attorney, unless the rule so expresses it. *Rivers* v. *Walker*.....*81
2. Report of referees set aside, for ordering the parties to withdraw, and examining the witnesses in their absence. *Hagner* v. *Musgrove*.....*83
3. Report that "75*l.* was due on the 3d of March last, &c." set aside for uncertainty. *Young* v. *Reuben*.....*119
4. Where the exceptions to a report of referees arise from the face of the report, and depend on a construction of law, they need not be filed in writing. *Buckley* v. *Durant*.....*129
5. Five several actions being referred, and only one report, the report was confirmed, contrary to the opinion of Shippen, President. *Brown* v. *Scott*.....*145
6. *It seems*, that referees have no authority to consolidate actions submitted to their decision. *Hart* v. *James*.....*355
7. What kind of evidence may be admitted before referees. *Hollingsworth* v. *Seiper*..*161
8. The admission of an interested witness, will not be sufficient to set aside the report of referees.....*Id.*

9. An attorney's agreement to refer, binds his client. *Somers* v. *Balabrega*.....*164
10. The courts have of late considered awards with great latitude, according to the intention of the arbitrators, appearing from the words of the whole. *Grier* v. *Grier*.....*173
11. Two of the essentials in awards, are, that they should be certain and final.....*Id.*
12. An award to pay to the executors of J. G. deceased, is sufficiently certain; and it may be averred who they are by name.....*Id.*
18. Report set aside, for allowing *ex parte* evidence to be given of the current price of coachmakers' work, at the time the action was brought. *Chaplin* v. *Kirwan*.....*187
14. It is not sufficient to invalidate a report, that the referees sent for the plaintiff alone, and asked him whether he would agree that a quarter's rent, which accrued after the action brought, should be credited to the defendant. *Innes* v. *Miller*.....*188
15. It is an inflexible rule not to appoint referees, except in the presence of both parties. *Shippen* v. *Bush*.....*251
16. Report of referees set aside for the error of the clerk in making out the rule or agreement to refer. *Tetter* v. *Rapesnyder*.....*293
17. The different kinds of awards in Pennsylvania. *Williams* v. *Craig*.....*314
18. If the court would grant a new trial, had the exceptions been made to a verdict, they ought, for the same reasons, to set aside a report...*Id.*
19. Report of referees set aside, 1st, Because the referees gave interest upon an unliquidated account; and 2d, Because they allowed a charge of premium and commission for making insurance, without requiring the policy to be produced, or any proof of its being lost.....*Id.*
20. The court have always confined themselves to two points, on motions to set aside reports of referees: 1st, Whether there is an evident mistake in matter of *fact*; 2d, Whether the referees have clearly erred in matter of law.....*Id.*
21. The court refused the application of referees for instructions on a point of law. *Geyer* v. *Smith*.....*347
22. Two actions between the same parties, on different promissory notes, being referred, the referees made one report for one sum; but afterwards filed a supplementary report, distinguishing what was due in each action: and it was held, that the first report could not be maintained; and that the second was irregular. *Hart* v. *James*.....*355
23. A rule of reference to report to *next term* does not authorise issuing executions upon a report *into office* during the vacation, although a term had intervened between the entry of the rule and the appointment of the referees.....*Id.*
24. Where a report of referees awards money to be paid on one side, and certain other things to be done on the other, if the court cannot enforce both, they will certainly enforce neither. *Kunckle* v. *Kunckle*.....*334
25. But though the court may not be able to do this by *execution*, yet, if they can do it by *attachment*, the remedies are mutual, though not by the same kind of process.....*Id.*
26. An *attachment* would lie for a contempt in not performing an award of referees at common law, before the stat. of 9 & 10 *Wm. III*.....*Id.*
27. In all cases, where matters are awarded to be done on both sides, the court will exercise their equitable powers in such a manner, as not to suffer either party to elude the performance of his part of the award.....*Id.*
28. If any part of an award be impossible to be performed, the court will refuse an *attachment* for that part.....*Id.*
29. It is too late to annul the rule for reference, when the referees have investigated the whole transaction, agreed upon their report, and were clear from any imputation of misconduct. *Oxley* v. *Oldden*.....*430
30. Report of referees set aside, because they declined to consider the most material ground of the controversy, upon a mistaken principle, leading to real injustice to one of the parties. *Pringle* v. *McClenachan*.....*486

REGULATORS.

See EJECTMENT, 8: PARTY-WALL.

RENT.

See COVENANT, 3.

REPLEVIN.

1. There are no replevins in Pennsylvania, either under the statute of Marlbridge, or at common law; but only under the act of assembly. *Weaver* v. *Lawrence*.....*156
2. The act of assembly does not recognise two kinds of replevin, one by plaint, and the other by writ.....*Id.*
3. Replevins are always made returnable writs by the act of assembly, and the parties' appearance required on the return.....*Id.*
4. The act directs replevins to be determined in the common pleas.....*Id.*
5. Replevin lies in Pennsylvania wherever a man claims goods in the possession of another.....*Id.*
6. Judicial writs *de proprietate probanda* cannot be issued in Pennsylvania.....*Id.*
7. The sheriff, in an action of trespass brought

against him, cannot justify under a writ of replevin, if he refused the defendant in replevin a reasonable time to find security on a claim of property, before the goods in question were removed. *Hocker* v. *Stricker*..*225
8. As the law gives the remedy of a distress to a landlord, it is incumbent upon the sheriff to see that the security is good, before he returns the property on a replevin. *Murdock* v. *Will*.....*341
9. The value of the distress, at the time of the replevin, and not the amount of the rent due, is the proper measure of damages..... *Id.*
10. Goods distrained ought to be valued, before they are delivered on replevin..... *Id.*
11. The sheriff is responsible for the sufficiency of the sureties in a replevin bond, at the end of the suit, when the landlord has established his right to the rent for which the distress was taken. *Oxley* v. *Cowperthwaite*.....*349
12. No evidence ought to be admitted, to contradict the sheriff's return of *elongatur*, after judgment *de retorno habendo* in replevin. *Phillips* v. *Hyde*.....*439
13. The goods of a stranger, being removed before the distress, cannot be pursued, within the thirty days. *Adams* v. *La Comb*..*440

See Costs, 5.

RESIDENT.

See Privilege, 1, 6.

RETURN.

See Replevin, 12.

REVOLUTION.

See Government.

ROADS.

1. The review of a road, though not taken notice of in the act of assembly, has always been granted, and is now become a matter of right. *King's Road*.....*11

SALE AND DELIVERY.

See Promissory Notes, 3: Property, 1.

SEAL.

1. A written or ink seal, is sufficient to a deed. *McDill* v. *McDill*.....*63

SHERIFF.

1. In an action of trespass brought against a sheriff, he may justify under a writ of replevin, if he has refused the defendant in replevin a reasonable time to find security on a claim of property, before he removed the goods in question. *Hocker* v. *Stricker*..*225
2. A *distringas* will lie against a sheriff, while in office, upon a return of levied to the value, &c. *Zane* v. *Cowperthwaite*.....*312
3. The sheriff, under a *vend. exp.*, must sell not merely to the *highest*, but to the *best* bidder. *Zantzinger* v. *Pole*.....*419

SLAVERY.

See Master and Servant, 2, 3, 5.

SPECIAL COURT.

1. A foreigner is not entitled to a special court, upon a debt assigned to him by a citizen. *Kunckel* v. *Baker*.....*169
2. The act for allowing special courts to plaintiffs, seems intended for the benefit of every man who is about to leave the state. *Williams* v. *Geheogan*.....*267

See Lis Pendens.

SUBJECT.

See Government, 6.

SUMMONS.

See Practice, 34: Privilege, 8.

SUBPŒNA.

See Costs, 4: Witness, 15.

SUPREME COURT.

1. A judgment cannot be entered in the supreme court, even in the county of Philadelphia, by warrant of attorney, upon a bond of a date prior to the act of assembly. *Kirkbride* v. *Durden*.....*288
2. As by that act, the original jurisdiction of the court is restricted to the county of Philadelphia, a judgment cannot, at any subsequent period, be entered as of Bucks county.....*Id.*
3. This court has authority, upon appeal, to alter and confirm any proceedings that come properly before the comptroller-general, but if he has no jurisdiction, the court can have none. *Respublica* v. *Sparhawk*.....*362
4. As the comptroller-general, therefore, has no right to adjudge a compensation from the state for damages, which individuals have suffered in the course of our military operations, the court can grant no relief upon appeal, although the applicant might be entitled to it, in equity.....*Id*

See Comptroller-General, 3.

TENDER.

1. The act of assembly of the 29th of January 1777, declares, that a tender shall amount to an actual payment and discharge; whereas, a tender at common law only suspends the interest until a subsequent demand and refusal. *Johnson* v. *Hocker*.....*406
2. Therefore, a tender in continental money, emitted by congress before the 29th of January 1777, is tantamount to payment.....*Id.*
3. But a tender in bills of credit emitted subsequent to the 29th of January 1777, has only the effect of a tender at common law....*Id.*

See PAYMENT, 2.

TITLE.

See EJECTMENT, 1, 3: EVIDENCE, 26.

TREASON.

1. A person accused of high treason, must have a copy of the indictment, a reasonable time, not less than one day, before the trial: and also, within the same time, a copy of the pannel of the jurors. *Respublica* v. *Molder*..*33
2. Adherence to American troops, though in consequence of mistaking them for the enemy, cannot be treason. *Respublica* v. *Malin*.....*33
3. Words indicating the defendant's intention to join the enemy, are proper testimony, to explain the motives upon which the intent was afterwards carried into effect.....*Id.*
4. Evidence may be given of an *overt* act committed in another county, after an *overt* act is proved to have been committed in the county where the indictment is laid.....*Id.*
5. Evidence that the defendant had a power to let people in and out of the city, when in possession of the enemy, ought to be received; but not as conclusive proof of his holding a commission under them. *Respublica* v. *Carlisle*.....*35
6. But evidence of his seizing salt, or disarming the Americans, does not apply to that species of treason; though it may prove his having joined the armies of enemy..... ..*Id.*
7. It is enough, to lay in the indictment, that the defendant sent intelligence, without setting forth the particular letter or its contents..*Id.*
8. The charge of levying war is not, of itself, sufficient; but assembling, joining and arraying with the forces of the enemy, is a sufficient *overt* act of levying war.....*Id.*
9. There must be an actual enlistment of the person persuaded, in order to make it treason in the persuader. *Respublica* v. *Roberts*..*39
10. If an *overt* act has been proved, where the indictment is laid, the defendant's confession may be given in evidence to corroborate that proof.....*Id.*
11. Treason is a crime known at the common law. *Respublica* v. *Chapman*.....*53
12. Treason, which is nothing more than a criminal attempt to destroy the government, may be committed before the different qualities of the crime are defined, and its punishment declared by positive law.....*Id.*

See TREATY OF PEACE.

TREATY OF PEACE.

1 After the peace, the court would not sustain a suggestion filed by the attorney-general, against one who was attainted in pursuance of a proclamation issued during the war; as a proceeding of that kind would contravene an express article in the treaty with Great Britain. *Respublica* v. *Gordon*.....*233

TRIAL.

1. The trial of a misdemeanor put off, on affidavit of the absence of a material witness; but declared not to be a precedent. *King* v. *Rapp* *9
2. The court will not force the crown to a trial, nor discharge the defendant from bail, without some appearance of oppression. *King* v. *Haas*..... .....*9
3. The stat. 28 *Edw. III.*, *c.* 13, granting trials *per medietatem linguæ* to foreigners, is in force in Pennsylvania. *Respublica* v. *Mesca*..... ....*73
4. The affidavit of one who was landlord to the defendant in ejectment, admitted, on motion to put off the trial of the cause. *Hunter* v. *Kennedy*..... .....*81
5. On affidavit of the absence of a material witness, the court put off the trial, refusing to inquire what his testimony would be. *Jackson* v. *Mason*.... .....*135
6. The affidavit of a person eventually interested in the suit, proving the want of a material witness, is sufficient to put off the trial...*Id.*
7. Granting new trials depends on the legal discretion of the court, guided by the nature and circumstances of the particular case. *Steinmetz* v. *Currey*.....*234

See ERROR, 8: PRACTICE, 10, 14, 29, 31; VERDICT.

UNDERWRITERS.

See INSURANCE.

UNITED STATES.

1. From the moment of the association of the United States, they necessarily became a body corporate; for there was no superior

from whom that character could otherwise have been derived. *Respublica* v. *Sweers*.. 41
2. Congress, during the late war, might lawfully direct the removal of any articles that were necessary to the maintenance of the continental army, or useful to the enemy, and in danger of falling into their hands; for they were vested with the power of peace and war, to which this is a natural and necessary incident. *Respublica* v. *Sparhawk*....*362

See GOVERNMENT: JUDGMENT, 4: LAW OF NATIONS: TREATY OF PEACE.

USURY.

1. Where a partial payment is made and received, on account of a note given for the payment of money borrowed at usurious interest, the usury is complete. *Musgrove* v. *Gibbs*.....*216
2. Proof of a note given by one of two partners, for the payment of money borrowed on usurious interest, and afterwards paid, will not support a count, stating the usurious contract to have been with the partners jointly .....*Id.*
3. Although no money is actually paid, the usury is complete, when new notes are taken in satisfaction of old ones given for the payment of money borrowed at a usurious interest..*Id.*
4. A fair purchase may be made of a bond or note, even at 20 or 30 per cent. discount, without incurring the danger of usury....*Id.*

VERDICT.

1. Strict form in a verdict is not necessary; it need only to be understood what the intention of the jury was, agreeable to which it may afterwards be molded into form. *Thompson* v. *Musser*.....*462

WARRANT OF ATTORNEY.

1. A warrant of attorney to confess judgment on a bond, is subservient to the bond, and execution cannot be issued until the time given for payment in the condition has elapsed. *Shoemaker* v. *Shirtliffe*.....*133
2. *Quære?* Whether a warrant of attorney to confess judgment in the court of common pleas, will authorise its being confessed in the supreme court. *Kirkbride* v. *Durden*.....*288

See JUDGMENT, 8.

WILL.

1. It is not necessary, that a will devising real estate should be sealed. *Hight* v. *Wilson*.....*94
2. Nor that all the subscribing witnesses should prove the execution.....*Id.*
3. Nor that the proof of the will should be made by those who subscribe as witnesses. *Id.*
4. Nor that the will should be subscribed by the witnesses .....*Id.*
5. Two witnesses are necessary to the proof of every testementary writing, whether for the disposition of real or personal estate. *Lewis* v. *Maris* *278

See ADMINISTRATOR: DEVISE.

WITNESS.

1. The defendant is not a competent witness to prove the person prosecuting; it must be done by indifferent witnesses. *King* v. *Lukens*.....*5
2. In an action on a policy of insurance, the master of the ship, having goods on board, and insured by other underwriters, who refused to pay until the determination of this suit, was examined on his *voir dire*, and, swearing himself disinterested, he was sworn in chief. *Wallace* v. *Child*.....*7
3. The plaintiff's brother was offered to prove his age, from the hearsay of his father and mother; but the court would not allow him to be sworn. *Albertson* v. *Robeson*.....*9
4. If a man thinks himself interested, though, in fact, he is not, this is sufficient to exclude his testimony. *McVeaugh* v. *Goods*....*62
5. An informer, on the seizure of contraband goods, cannot be a witness, although he releases his right to the moiety. *Rapp* v. *La Blanc*.....*63
6. Where a party calls a witness who is contradicted by another witness of his own, he cannot call the first, to disprove what the second has said.....*Id.*
7. It seems, that a confidential clerk or agent may be compelled to become a witness against his principal. *Morris* v. *Vanderen* *66; *Holmes* v. *Conegys* *439
8. Wife of the prosecutor in an indictment of forcible entry may be a witness to prove the force; but only the force. *Respublica* v. *Shryber*.....*68
9. On an indictment for forgery, the party whose name is forged, is a good witness. *Respublica* v. *Keating*.....*110
10. That referees have heard an interested witness is not a sufficient cause to set aside their report. *Hollingsworth* v. *Leiper*.....*161
11. The subscribing witnesses to a promissory note must be produced, or some account given of them at the trial. *January* v. *Goodman*.....*208
12. In an action brought by the indorsee of a bill of exchange against the first indorser, the plaintiff's immediate preceding indorser cannot be made a witness, by striking his name off the *first* and *third* bills of the set,

although it is suggested that the *second* bill was lost. *Steinmetz* v. *Currie*..... *272

13. There are two ways of proving a witness to be interested; 1st, by examining him on his *voir dire*, and 2d, by evidence; but both cannot be pursued at the same time. *Mifflin* v. *Bingham*.....*275

14. A cross examination, under a rule for taking depositions, will not amount to an examination of the witness on his *voir dire;* nor preclude any exception to his competency at the trial.....*Id.*

15. In what cases it is, or is not, necessary to take out a *subpœna* for a witness.....*Id.*

See AGENT: EVIDENCE: WILL.

WORDS.

1. The word *purchase*, implies a purchase in fee. *Hurst* v. *Dippo*.....*21

2. The word *persuading* used in the act with respect to treason, means to *succeed*. *Respublica* v. *Roberts*.....*39

3 Though in actions of slander, words were formerly construed in the mildest sense that they would admit, they are now to be taken according to their ordinary import and meaning. *Respublica* v. *De Longchamps*....*114

WRIT OF INQUIRY.

1. The court will not set aside the verdicts of juries of inquiry upon frivolous grounds, nor examine the effect of any particular piece of evidence on the mind of the jury; for unless it appears, that there was *no* proper evidence, the court will presume that they had sufficient grounds for their inquest. *Leib* v. *Bolton*.....*82

2. After judgment by default, the defendant has a right to offer his evidence to the jury of inquiry to combat the plaintiff's proofs; and if the sheriff refuses to hear the evidence on both sides, the court will direct a new writ of inquiry. *McClenachan* v. *McCarty*....*375

3. But after judgment in a foreign attachment, the defendant in the attachment is not entitled to produce evidence before the jury of inquiry.....*Id.*

4. There is nothing in the act of assembly which precludes the sheriff from holding an inquest, after the return of the *fi. fa.* *Weaver* v. *Lawrence*.....*379

5. An inquisition, quashed for irregularity, becomes a nullity, and leaves the case just as if none had been taken.....*Id*

Stanford Law Library
3 6105 062 275 180